Supreme Court, U. S.
FILED
SEP 20 1978
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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I N D E X

Subject Index

	Page
Opinions Delivered in the Courts Below	1
Jurisdiction	3
Question Presented	4
Statutory Provisions	4
Statement of the Case	6
Reasons Relied on for Allowance of the Writ	8
(1) The Court of Appeals has rendered a decision in conflict with the decisions of the other Courts of Appeals on the same matter.	8
(2) The Court of Appeals decision herein conflicts with decisions of this Court	17
(3) The Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court.	20
Conclusion	24
Appendix	

CITATIONS

Cases

Page

Albert v. Paulo, 552 F2d 1139 (5th Cir. 1977). 12

Brown v. Ivarans Rederi A/S, 545 F2d 854 (1976) 15

Cooper Stevedoring Company v. Kopke, 417 U.S. 106 (1974) 18

Croshaw v. Koniklijke Nedlloyd, B.V. Rijawijk, 398 F.Supp. 1224 (D. Ore. 1975) 11

Dobbins v. Crain Brothers, Inc., 567 F2d 559 (1977) 15

Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975), cert. denied, 425 U.S. 944 (1976) 11

Halcyon Lines v. Haenn Ship Ceiling and Refiting Corporation, 342 U.S. 282 (1952). 17,18

Howard v. Romen, Inc., 442 F.Supp. 1142 (S.D. Ala. 1977). 13

Hubbard v. Great Pacific Shipping Company, Monrovia, 404 F.Supp. 1242 (D. Ore. 1975) 11

Landon v. Lief Hoegh and Company, Inc. 521 F2d 756 (1975), cert. denied 423 U.S. 1053 (1976) 13,14

Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 795 (E.D. Pa. 1974). 14,15

Marrant v. Farrell Lines, Inc.,
550 F2d 142 (3rd. Cir. 1977). . . .13

Northeast Marine Terminals, Inc.
v. Caputo, 432 U.S. 249 (1977). . .23

Pope and Talbot Inc. v. Hawn, 346
U.S. 406 (1953) 17

Samuels v. Empresa Lineas Martimas
Argentinas, 573 F2d 884 (1978). . .12

Shellman v. U.S. Lines, Inc., 528
F2d 675 (1975), cert. denied, 425
U.S. 936 (1976) 11

Shepler v. Weyerhaeuser Company,
569 P2d 1040 (Ore. 1977). 16

Zapico v. Bucyrus-Erie Company,
No. 77-7533 (decided June 15,
1978) 14

Other

33 U.S.C. Section 905
Section 5(a). 4
Section 5(b). 5

IN THE SUPREME COURT
OF THE
UNITED STATES

No.

STANLEY D. EDMONDS, Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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OPINIONS DELIVERED IN THE COURTS BELOW:

Petitioner, a longshoreman, received benefits under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S. C. Section 901 et seq. for injuries received aboard defendant's vessel. Additionally he brought the instant suit

against the defendant vessel owner for negligence. That suit was tried with a jury in the United States District Court for the Eastern District of Virginia, Norfolk Division, before the Honorable Richard B. Kellam, District Judge on March 6, 7th and 10th, 1975. A verdict in the amount of $97,500.00 was rendered against the vessel owner (by Order dated September 3, 1975). The Court set aside the verdict and ordered a new trial.

On December 16, 1975, a new trial with a jury was had before the Honorable John A. McKenzie, District Judge, and a verdict was returned against the vessel owner in the amount of $100,000.00. The amount of the verdict was reduced to $90,000.00 on the finding of 10% contributory fault of the plaintiff, and judgment was entered in that amount by Order dated March 3, 1976. The matter was appealed by defendant in the District

Court to the Court of Appeals for the Fourth Circuit. A panel of the Fourth Circuit in an Opinion dated May 6, 1977 limited the vessel owner's liability to "the extent of its fault, in this case $20,000.00." 558 F2d at 189; App. at p.26. Rehearing en banc was granted on June 3, 1977. The en banc decision of the Fourth Circuit, decided June 22, 1978, reversed the District Court's entry of judgment in the amount of $90,000.00 and remanded the case for entry of judgment against the shipowner for $20,000.00 and for further deliberation on the distribution of $20,000.00 between the longshoreman and the stevedore. All pertinent opinions are appended.

JURISDICTION

The date of the Judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is

June 22, 1978. That decision was the result of the Fourth Circuit's en banc rehearing of the decision rendered May 6, 1977, by a panel of that court. No rehearing of the June 22, 1978 decision has been requested and no extention of time has been requested.

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Does 33 U.S.C. Section 905(b), as amended in 1972, permit a reduction in a vessel owner's liability to an injured longshoreman where the vessel owner's negligence is joined by concurring negligence on the part of the longshoreman and his stevedore employer?

STATUTORY PROVISIONS

33 U.S.C. Section 905:

> Sec. 5. (a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his

legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or

indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

STATEMENT OF THE CASE

Stanley Edmonds was employed by Nacirema Operating Company, a stevedoring company, as a longshoreman to assist in the unloading of the vessel SS ATLANTIC

COGNAC, owned by the defendant Compagnie Generale Transatlantique, while the vessel was docked at Portsmouth Marine Terminals, Portsmouth, Virginia, on March 3, 1974. While performing his duties Edmonds sustained serious and permanent injuries when a container which he was behind rolled back, crushing him against the bulkhead of the vessel. A mate employed by the vessel had ordered Edmonds behind the container to remove a jack which had been placed there for stability during the voyage from Europe. A "hustler" operated by a fellow longshoreman, in clear view of the mate, had at approximately the same time circled in the hold of the vessel and backed into the container causing it to roll back on Edmonds. The air brakes on the container were inoperable because a pet cock had been left open apparently when the container was loaded on the vessel

in Rotterdam. Jurisdiction in the court of first instance, the United States District Court for the Eastern District of Virginia existed by virtue of Title 28, U.S.C.A. 1332 on the grounds of diversity of citizenship and the amount in controversy.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Court of Appeals has rendered a decision in conflict with the decisions of the other Courts of Appeals on the same matter.

The question of whether Section 905(b) of the Longshoremen's Act permits a reduction in the damages for which a shipowner is liable to a longshoreman to an amount equal to the shipowner's proportion of fault has been answered in the negative by every Court of Appeals which has considered the question in a maritime context, except for the Fourth Circuit. The Ninth Circuit, the Fifth

Circuit and the Second Circuit (ruling by way of dictum) have all rejected any reduction of a shipowner's liability because of concurrent stevedore negligence. The Third Circuit has repeatedly noted the criticisms of the proportionate fault scheme, though it has not yet ruled on that question. The District Courts in these circuits have reached decisions in accord with the Courts of Appeals. Only in the Fourth Circuit has a maritime case been decided contrary to that position; only in the Fourth Circuit does a shipowner reduce his damages at the longshoreman's expense, by demonstrating some concurrent fault on the part of the stevedore. The anomalous result was very aptly described by Judge Hall, dissenting from the Edmonds majority, when he said:

> "For the longshoreman himself, the amount of his tort recovery now becomes

> totally dependent on a new and judicially created 'situs test' from the border of Washington State past Texas, Louisiana, and North to Georgia, and from Delaware to Maine, the injured longshoreman recovers the full award against a vessel, reduced only by his own contributory negligence. The maritime areas of the states which comprise the Fourth Circuit now stand alone in their reduction of the longshoreman's damage award due to the negligence of the stevedoring company." Slip Opinion at 15, App. at p. 67.

This result is particularly inappropriate in view of the intention of Congress that the Act be applied uniformly throughout all jurisdictions. It is equally inappropriate in that the stevedore is not a party to the suit and has no opportunity to present evidence to negate any finding as to its negligence. A review of the cases decided by the other Courts of Appeals points out both the aberrant nature of the Edmonds holding and the difference in recovery

rights that it creates between longshoremen in the Fourth Circuit and longshoremen elsewhere.

A review of the Ninth Circuit reveals: Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975), cert. denied, 425 U.S. 944 (1976) and Shellman v. U.S. Lines, Inc., 528 F2d 675 (1975), cert. denied, 425 U.S. 936 (1976), the Court rejected any reduction of the longshoreman's recovery against the vessel on account of stevedore negligence.

The same result has been obtained in District Court cases. Hubbard v. Great Pacific Shipping Company, Monrovia, 404 F.Supp. 1242 (D. Ore. 1975), rejected any reduction in the vessel's liability on the ground that it would negate the congressional intent embodied in the 1972 Amendments to avoid circuitous suits. The Court in Croshaw v. Koniklijke Nedlloyd, B.V. Rijawijk, 398 F.Supp. 1224

(D. Ore. 1975) followed Hubbard, though Judge Skopil personally would have preferred a different result.

A review of the Fifth Circuit reveals: Samuels v. Empresa Lineas Martimas Argentinas, 573 F2d 884 (1978), where the Court adopted the reasoning of the Ninth Circuit, concluding that to reduce the vessel's liability because of the employer's negligence would reduce the award of the plaintiff, the one person who is blameless. The Court rejected any reduction of the vessel's liability.

That same conclusion was reached in a different fashion in the earlier case of Albert v. Paulo, 552 F2d 1139 (5th Cir. 1977), where the Court permitted full recovery of the stevedore's insurer's lien without regard to the stevedore's concurring negligence.

The same conclusion was reached by

the District Court in Howard v. Romen, Inc., 442 F.Supp. 1142 (S.D. Ala. 1977).

A review of the Second Circuit reveals: In Landon v. Lief Hoegh and Company Inc., 521 F2d 756 (1975), cert. denied 423 U.S. 1053 (1976), the Court noted its opinion that some negligence on the employer's part would not cut off the longshoreman's right to sue the ship. The Court also noted that a reduction in the shipowner's liability to the longshoreman on account of compensation payments would be the substantial equivalent of contribution by the employer. The Court's language in Landon leads to the conclusion that the Second Circuit "will not follow an 'equitable credit' doctrine or any similar apportionment of liability in Section 905(b) cases under the 1972 Amendments." See Judge Van Dusen, concurring in Marrant v. Farrell Lines, Inc., 550 F2d 142 (3rd. Cir. 1977).

More recently, in Zapico v. Bucyrus-Erie Company, No. 77-7533 (decided June 15, 1978), the Second Circuit stated that:

> "We think that Landon v. Lief Hoegh does commit us . . . against any 'credit' that by considerably reducing the longshoreman's award from a negligent non-employer might impair the right of even a negligent employer fully to recoup his compensation payments out of that award." (Slip Opinion at 20).

Thus the Second Circuit has rejected (at least by way of dictum) any reduction in the vessel's liability.

A review of the Third Circuit reveals: In Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974), the Court thoroughly reviewed the adoption of the 1972 Amendments. The Court concluded that any reduction of the vessel's liability because of stevedore negligence would contravene the intent of Congress in the Amendments. Id. at 768-69. This view found support from

that Court of Appeals in Brown v. Ivarans Rederi A/S, 545 F2d 854 (1976), where the Court said in a footnote that the equitable credit theory appeared to be inconsistent with the conclusion reached in Lucas. Id. at 858, n. 6. The Third Circuit also noted there that the equitable credit doctrine was generally rejected by the courts which considered it.

The Court declined to decide the question in Marrant, supra, calling it still "very much an open question" 550 F2d at 147. However, in Dobbins v. Crain Brothers Inc., 567 F2d 559 (1977), the Court noted that the "equitable credit" theory had been criticized in Marrant and Brown and had been rejected by Shellman, Dodge, and Lucas. Thus, despite repeated opportunities to adopt the "equitable credit" the Third Circuit has refrained from doing so and has recognized

the criticisms of the application of that doctrine.

In addition, even in state courts which have considered the equitable credit approach under the Longshoremen's Act, the doctrine has been rejected. See Shepler v. Weyerhaeuser Company, 569 P2d 1040 (Ore. 1977), where the Oregon Supreme Court refused to allow an off-set to the vessel because of stevedore negligence.

In summary, the Fourth Circuit's adoption of a reduction in the vessel owner's liability because of concurrent stevedore negligence stands by itself among the maritime Courts of Appeals which have considered the issue. The sharp conflict between the decisions of the various other Courts of Appeals and the Fourth Circuit's approach should be resolved by the Supreme Court through a review of the Fourth Circuit's opinion

herein.

(2) The Court of Appeals decision herein conflicts with decisions of this Court.

It is a rule long established by this Court that a shipowner is not entitled to contribution from a joint tortfeasor, where that joint tortfeasor is a stevedore employer covered by the Longshoremen's Act. Halcyon Lines v. Haenn Ship Ceiling and Refiting Corporation, 342 U.S. 282 (1952). There, the Court rejected the vessel owner's contention that a stevedore employer should be liable for a contribution based upon the relative degree of fault of each. This Court properly focused on the fact that Congress stopped short of approving the contribution urged by the vessel and the Court declined to approve such a doctrine without congressional action.

In Pope and Talbot Inc. v. Hawn,

346 U.S. 406 (1953), this Court also refused to permit a reduction of the vessel's liability by the amount of compensation payments made to the longshoreman by the stevedore. The Court characterized any such reduction in the vessel's favor as the substantial equivalent of contribution, which the Court had declined to require in Halcyon. Id. at 412.

More recently, this Court has reaffirmed its ruling in Halcyon that contribution from the employer is inappropriate. In Cooper Stevedoring Company v. Kopke, 417 U.S. 106, (1974), this Court did allow contribution by a non-employer joint tortfeasor. However, the Court reaffirmed it holding that employers under the Longshoremen's Act were not subject to such contribution. Id. at 113. The Court was careful to point out that "Halcyon was, and still

is, good law on its facts." Id. at 115.

However, despite this historical rule against contribution by the stevedore employer at the expense of the employee, the Fourth Circuit Opinion does require contribution or its essential equivalent. The vessel's liability is reduced by the proportion of stevedore fault, thereby reducing the longshoreman's recovery and reducing the ability of the longshoreman to repay the compensation lien of his employer. In a large number of cases, the longshoreman's total recovery from the vessel, after the application of the Fourth Circuit's "inequitable diminution," will be less than the compensation lien. This will be particularly likely to occur where the compensation lien is quite substantial. Such an impairment of the stevedore's lien is the functional equivalent of contribution, which this Court has held is inappropriate

under the Longshoremen's Act. The Fourth Circuit's Opinion should therefore be reviewed by this Court to bring it into conformity with prior decisions of this Court.

(3) The Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court.

Congress, when it enacted the 1972 Amendments to the Longshoremen's Act, intended that legal questions arising under the negligence action should be determined as a matter of Federal Law. That Federal Law is currently in a state of tremendous uncertainty because of the Fourth Circuit's Opinion. Stevedores are uncertain of their role in suits by longshoremen against shipowners. Longshoremen are uncertain whether or not to vigorously defend the stevedore's action that brought about their injuries.

Should stevedores participate in the trial in an effort to protect their compensation liens or does that bring back the circuitous three party suits Congress abolished in 1972? Carriers are unsure how to cover stevedore compensation risks, or exactly what risks it is the stevedores need to have covered. Uncertainty about the status and amount of the compensation lien makes the setting of rates difficult. Vessel owners are unsure what third party risks to insure against. And the setting of cargo rates by vessel owners and of contract rates by stevedores must be recalculated in view of the Fourth Circuit's ruling. Needless to say these rates may well be different in the Fourth Circuit than elsewhere because the risks of the various parties are now so different in the Fourth Circuit.

Longshoremen are denied the full benefit of the negligence remedy enacted

by Congress and must bear the burden of any inequity in the Edmonds ruling. Longshoremen face the additional burden of having to show that the stevedore was free from negligence, a burden imposed upon no other plaintiffs under land-based law. The courts are caught up in the uncertainty as well, for settlement of longshoremen's negligence suits is now made more complicated and in fact differs from court to court. Now all parties to the suit, and stevedore non-parties, must attempt to estimate the effect of stevedore negligence, if any, and factor that calculation into any settlement discussions. If the private settlement of disputes is to be judicially encouraged, the Fourth Circuit approach is counterproductive.

The 1972 Amendments made many substantial revisions in the Longshoremen and Harbor Workers' Compensation Act.

As the law is applied in a variety of cases by a variety of courts, it is only logical to expect that from time to time the Supreme Court will be called upon to provide guidance on particular matters. For example, after several years of development by the lower courts on the issue of "jurisdiction" of the Act after the Amendments, it was necessary for this Court to speak decisively. That was accomplished by the Court in Northeast Marine Terminals, Inc. v. Caputo, 432 U.S. 249 (1977). Through that opinion, the Court largely resolved disputes as to coverage under the Act. That decision by the Court essentially settled an important question of Federal Law.

The same kind of judicial determination is now necessary with respect to the negligence remedy under Section 905 of the Act. Review by this Court of the Edmonds Opinion will provide the kind

of guidance necessary to bring stability and uniformity to the nation's maritime industry. Once the Section 905 negligence remedy is clarified by this Court, the entire industry--vessel owners, stevedores, and longshoremen--can go about the business of maritime commerce knowing exactly what the respective rights and duties of the various parties are under the law. Such a state of certainty can only benefit the entire maritime industry. This important question of Federal Law should be settled by this Court, through a review of the Fourth Circuit's Opinion herein.

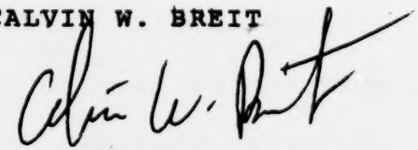
CONCLUSION

The decision of the Court of Appeals herein creates an injustice to longshoremen by reducing the vessel's liability by the proportion of any stevedore fault, contrary to the decisions of the otner

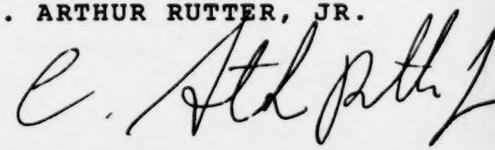
Court's of Appeals which have considered the issue and contrary to the previous holdings of this Court. A Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit herein.

Respectfully submitted,

CALVIN W. BREIT



C. ARTHUR RUTTER, JR.



Attorneys for Petitioner
Stanley D. Edmonds

CERTIFICATE OF SERVICE

I, C. Arthur Rutter, Jr., certify that on or before 11th day of September 1978, I mailed, postage prepaid, 40 copies of this Petition for Certiorari to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles F. Tucker, Vandeventer, Black, Meredith and Martin, One Commerical Place, Virginia National Bank Bldg., Norfolk, Virginia, counsel for the respondent.

C. Arthur Rutter

APPENDIX

APPENDIX INDEX

Page

Memorandum Order of Judge Richard B. Kellam, dated September 3, 1975 . . A1

Memorandum Order of Judge John A. MacKenzie, dated March 3, 1976. . . A15

Panel Decision, Fourth Circuit Court of Appeals, dated May 6, 1977. . . . . A22

En Banc Decision, Fourth Circuit Court of Appeals, dated June 22, 1978. . . . . A49

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

STANLEY D. EDMONDS, Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	NO. 74-339-N
COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.	:	MEMORANDUM ORDER

Stanley D. Edmonds obtained a jury verdict in his action against defendant for alleged negligence. Defendant moves to set the verdict aside and to enter judgment for it or, in the alternative, grant it a new trial. Defendant contests the sufficiency of the evidence and asserts there were errors in the granting in the charge to the jury.

The accident occurred March 3, 1974, and is, therefore, governed by the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Sec. 901, et seq., which became effective November 26, 1972.

Plaintiff contended defendant had been negligent in (1) permitting containers to be loaded on its ship without having the air brakes on the containers applied, and (2) the action of the ship's crew in directing plaintiff to remove a jack from behind a container when a hustler was ready to engage the container.

Defendant's ship, the SS ATLANTIC COGNAC, was loaded at Rotterdam by stevedores employed for that purpose. Containers were rolled aboard the ship and secured in place by 12 to 18 chains, and jacks which blocked the wheels. Some containers have an air-braking system which can be hooked up to the trailer-tractor combine to control the movement of the trailer, principally when applied on the highway. After the trailer is in place aboard the ship, its air brakes may be applied to assist in holding the container steady.

On the occasion in question, Nacirema

Operating Company, Inc., was employed to unload the ship. One Hyman was in charge of the stevedores, and decided the method to be used in removing the containers. A hustler was used to pull the containers off the ship onto the wharf and to the storage area. The hustler would back up and engage the container and proceed to pull it off the ship. Among the duties of the longshoremen was that of removing the chains and jacks from the containers. As the longshoremen were preparing to remove one of the few remaining containers, plaintiff said a member of the ship's crew came around. Seeing a jack behind one of the containers, he said the ship's crewman directed him to remove it. The back of this container was about two feet from the side of the ship. Plaintiff says that as he went between the rear of the container and the side of the ship to remove the jack, the hustler backed into the

container causing the container to roll back, pinning him against the side of the ship and inflicting injuries on him.

Plaintiff contends that if the air brakes had been applied to the container when it was stowed in Rotterdam, it would not have rolled back when the hustler backed into it. There was no evidence the ship's crew knew the air brakes were not applied. But plaintiff says that in the exercise of ordinary care in seeing that the containers were properly stowed, the ship should have known the air brakes were not fixed. Defendant says that it was the duty of the stevedores to determine whether the air brakes were applied; that the air brakes are for use on the highway and not for holding the container in place, because the container is chained and chocked in place; that all containers are not equipped with brakes and that even if it had knowledge the air brakes were

not fixed, it had no duty to warn the longshoremen as they could easily determine this issue and it was their duty to do so.

While defendant says there has been no showing it was guilty of negligence, it says even if there were such a showing, the court erred in the charge given the jury. It complains in particular of the following:

Charge A

> "A vessel owner, under admiralty law, owes the duty of exercising ordinary care towards all persons lawfully aboard the vessel, and the defendant has the duty of seeing that the cargo is properly stowed, and he is charged with whatever knowledge it, the defendants, would have acquired as to the nature and characteristics

of the cargo carried on the vessel by the exercise of ordinary care to acquaint themselves with the facts and the defendant was bound to take reasonable precautions in light of such knowledge to protect longshoremen like the plaintiff, Stanley D. Edmonds, who was employed to assist in unloading the cargo."

Charge B

"If you find from a preponderance of the evidence that the plaintiff was injured when a container moved into him and if you further find from a preponderance of the evidence that the defendant's mate, while sup-

ervising and reviewing the unloading operation directed or ordered the plaintiff to remove a jack in the vicinity of his injury at the time when he knew or should have known that the container was then and there being moved by a hustler, then the defendant was guilty of negligence."

Defendant says that Charge "A," in effect, told the jury that the defendant had a duty to provide the longshoremen with a safe place to work. As to Charge "B," defendant says it is not supported by the evidence, is an incorrect statement of the law, and is misleading.

- A -

The Fourth Circuit made it clear in Bess v. Agromar Line, ___F.2d___(July 7,

1975), that the traditional absolute liability for breach of the non-delegable duty to provide those who come aboard its vessel a safe place in which to work was an outgrowth of the doctrine of seaworthiness, "and differs significantly from the concept of negligence." Now the longshoreman is prohibited from bringing an action against the ship based on the warranty of seaworthiness or a breach thereof. In the Bess case, supra, the court referred to the legislative history of the 1972 amendment, and quoted the following from that history:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action

> is concerned, and not to endow him with a special maritime theory of liability or cause of action under whatever judicial nomeclature it may be called, such as 'unseaworthiness,' 'non-delagable duty,' or the like." House Report No. 92-1441, 92d Congress, 2d Session (1972).

Hence, it is clear that the duty owed to the longshoreman is no different from that "in non-maritime employment ashore," and he is not endowed "with any special maritime theory of liability or cause of action." The Charge "A" above told the jury the shipowner had the "duty of seeing that the cargo is properly stowed;" and that the ship was chargeable with whatever knowledge it would have acquired as to the nature and character-

istics of the cargo, and in the exercise of ordinary care, it should acquaint itself with the facts.

The effect of this charge was to place the owner of a vessel in a different class and impose a greater duty on him than is imposed upon nonmaritime employers. The legislative history makes it clear that all such claims are pursuant to the common law, and of equal dignity to other negligent claims. The history, 92d Congress, 2d Session (1972), vol. 3, page 4704, pointed out:

> "So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish:

(1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore."

Continuing, the report said it was intended the ship would "not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a

land-based third party in a nonmaritime pursuit liable under similar circumstances." Id. p. 4704.

In this case, and as the court pointed out in the Bess case, supra, "[t]he allegedly unsafe condition was the result of the loading process which was under the sole control of the independent stevedoring contractor." There was no evidence the ship had any knowledge that the air brakes had not been applied. Whatever the ship could have learned from inspection, the stevedore could have learned. There is not now any greater duty owing by the ship to the longshoreman than is owed by land-based landowners to invitees. See Citizen v. M/V TRITON, 384 F.Supp. 198 (D.C. Tex. 1974); Ramirez v. Toko Kaiun K.K., 385 F.Supp. 644 (N.D. Cal. 1974). The longshoreman no longer has a cause of action against the shipowner for alleged failure to provide him a safe

place in which to work as a nondelegable duty. The primary responsibility for the safety of the longshoreman lies with the stevedore.

- B -

Defendant says Charge "B" was misleading and without evidence to support it. First it says there was no evidence that the ship's mate was "supervising and reviewing the unloading operation," nor that he ordered plaintiff to remove a jack at a time when he knew or should have known the container was "then and there being moved by a hustler." Too, even if the longshoreman was directed to move the jack, there was no reason to believe plaintiff would go behind the container. Nor would the direction to move the jack in and of itself constitute negligence, as the mate would have expected plaintiff to exercise reasonable care

in undertaking the removal; that he would do so at a proper time, in a proper manner, and when it would appear reasonably safe for him to do so.

In view of the evidence and the errors in charging the jury, the judgment entered on the verdict of the jury is SET ASIDE and a new trial is awarded.

Counsel shall appear on Monday, September 15, 1975, at 9:00 a.m. to select a new date for the trial of this action.

RICHARD B. KELLAM
U.S. District Judge

At Norfolk, Virginia
September 3, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

STANLEY D. EDMONDS, Plaintiff,	:	CIVIL ACTION NO. 74-339-N
vs.	:	
COMPAGNIE GENERALE TRANSATLANTIQUE, Defendant.	:	MEMORANDUM ORDER

Plaintiff, Edmonds, a longshoreman employed by Nacirema Operating Company, Incorporated, a stevedoring company, was injured on March 3, 1974 in the course of his employment as a stevedore while working aboard the SS ATLANTIC COGNAC, a vessel owned by the defendant, Compagnie Generale Transatlantique. This suit proceeds against the owner of the vessel alleging the owner's negligence.

At trial on December 17, 1975 the Court utilized a special verdict form whereby the jury was required to determine, in addition to the issue of

liability, the respective percentages to which the negligence of the plaintiff, the defendant shipowner, and the stevedore, Nacirema, contributed to the plaintiff's injury. The jury also determined the total damage to which the plaintiff would be entitled. The jury returned a verdict in favor of the plaintiff for $100,000.00. They also found that the plaintiff's fault contributed 10%, the shipowner's fault contributed 20%, and the stevedore's fault contributed 70%.

Judgment on the verdict was withheld pending a further inquiry, now completed, on whether plaintiff's recovery should be reduced by the percentage of his own contributory negligence, and allowed as against the shipowner only to the percentage of negligence attributable to that party. On the one hand, the plaintiff's verdict would be reduced from $100,000.00 to $90,000.00 on account of his own 10%

negligence. On the other hand, the reduction would be from $100,000.00 to $20,000.00 if we make shipowner responsible only for his 20% negligence as found by the jury.

A few months ago in this same tripartite type of case, i.e., injured longshoreman, negligent employer-stevedore, and negligent shipowner, Speller, et al.v. American Export Lines (E.D. Va. 1975), Civil Action No. 74-542-N, unreported), we held that it was inequitable for a shipowner to be saddled with the total damage award in favor of an injured longshoreman, to the complete exclusion of the negligence of a negligent employer-stevedore, whose culpability far exceeded that of the shipowner. We were faced then, and again in the present case, with the proposition that a 70% negligent employer-stevedore pays nothing and even recovers the compensation benefits paid by him, while a 20% negligent ship-

owner pays the entire judgment including the repayment of compensation benefits to the employer-stevedore.

In reaching our decision in Speller above, we relied upon Frasca v. Prudential Grace Lines, Inc., 394 F.Supp. 1092 (D.C. Md. 1975) and Shellman v. United States Lines, Inc., 1975 AMC 362 (D.C. Cal.1975). Speller was not appealed, nor reported. This approach appeared compatible with the Senate Report 92-1125 anent the 1972 amendments to the Compensation Act embodied in 33 U.S.C. Sec. 905(b), in which report it was the declared intent that ". . . the vessel shall not be chargeable with the negligence of the stevedore or employees of the stevedore."

In the case at bar we employed similar interrogatories to the jury with the resulting determination that the plaintiff, Edmonds, was 10% percent contributorily negligent, Compagnie Generale

Transatlantique, shipowner, was 20% negligent, and that Nacirema Operating Company, Incorporated, stevedore-employer, was 70% negligent. It was our intent at that time to apply these percentages against the gross amount of the verdict in accordance with the reasoning of Frasca, supra, Shellman, supra, and Speller, supra.

Very recently, however, the Second Circuit in Landon v. Leif Hoegh & Company, 521 F2d 746 (2d Cir. 1975), while recognizing the inequity in allowing the negligent stevedore-employer to escape monetarily unscathed, nevertheless concluded that the inequity was one to be remedied by legislation rather than by the courts.

In addition, the district court decision of Shellman v. United States Lines, Inc., cited above, upon which this court had partially relied, was reversed

on November 21, 1975 by the Ninth Circuit, No. 75-3071. Also recently, the Ninth Circuit in Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, No. 75-1442 (9th Cir., November 21, 1975) has again rejected the district court Shellman reasoning. Additional research has disclosed that Lucas v. "Brinknes" Shiffahrts Ges. v. Northern Metal Co., 379 F.Supp. 759 (E.D. Pa. 1974), Santino v. Liberian Distant Transports, Inc., 75 AMC 1649 (W.D. Wash. 1975) and Hubbard v. Great Pacific Shipping Co., ___F.Supp. ___(D.C. Oregon, June, 1975), likewise have rejected the reasoning which would grant some relief to shipowner by reducing the damages assessable against it to the negligence for which it was accountable percentagewise.

In light of this authority, we, reluctantly, reverse our previous stand. It now appears that a 20% negligent shipowner

must bear the entire brunt of the damage award without contribution from a 70% negligent employer-stevedore, who not only pays not one cent but recovers the compensation benefits paid to the employee. We invite the Court of Appeals of this Circuit to examine this matter.

Judgment will be entered for the plaintiff, Stanley D. Edmonds, against the defendant, Compagnie General Transatlantique, in the amount of $90,000.00, with interest from December 17, 1975, and costs.

It is so ORDERED.

JOHN A. MAC KENZIE
U.S. District Judge

Norfolk, Virginia
March 3, 1976.

UNITED STATES COURT OF APPEALS
Fourth Circuit

STANLEY EDMONDS,
Appellee,

vs. Nos. 76-1545 - 76-1547

COMPAGNIE GENERALE TRANSATLANTIQUE,
Appellant (two cases).

Decided May 6, 1977.

WIDENER, Circuit Judge:

This action arises under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1927,[1] a remedial statute governing suits by longshoremen injured upon navigable waters in the course of their employment. Plaintiff, Stanley Edmonds, a longshoreman employed by Nacirema Operating Company, which was not a party to this case, was injured while unloading rolling cargo containers from the S.S. Atlantic Cognac, a vessel owned by defendant Compagnie

1. The stevedore has not until this time participated in this case.

Generale Transatlantique, at Portsmouth, Virginia on March 3, 1974. Edmonds received statutory compensation benefits in excess of $20,000 from his employer under the statute and, as authorized by 33 U.S.C. Sec. 905(b),[2] instituted an action for damages against the vessel as a third party based upon its alleged negligence.

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2. 33 U.S.C. Sec. 905(b):

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon

(Footnote 2. continued from Page A23)

the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

A jury trial was held in March 1975, resulting in a verdict for Edmonds in the amount of $97,500. Subsequently, however, the district judge granted defendant's motion for a new trial, based upon errors committed by the court in charging the jury.

[1] A second trial was held in December 1975, again resulting in a verdict in Edmonds' favor, this time for $100,000. In response to a special verdict submitted to the jury at the conclusion of the second trial, it was found that Edmonds was 10% contributorily negligent; that the defendant vessel's negligence contributed 20% to the injuries sustained, and that the stevedore employer's negligence contributed 70%. Despite this finding of comparative fault on the part of the stevedore as well as the plaintiff, however, the district court entered judgment against the

vessel owner for $90,000, reducing the award only to the extent of the plaintiff's comparative negligence.[3]

The issues presented for our consideration are these: (1) Did the district court abuse its discretion in ordering a new trial on the basis of instructions propounded to the jury that, in the court's opinion, lacked evidentiary support and imposed a greater duty on the defendant than authorized by the Longshoremen's Act? We think not, and affirm the district court's grant of a new trial. (2) Should the district court have reduced Edmonds' recovery against the vessel owner to an extent commensurate with the vessel's degree of comparative

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3. This reduction of the award to the extent of the plaintiff's negligence was proper on the part of the district court and is unquestioned by the parties to these appeals. See Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).

fault in causing the injuries sued upon? This is an issue not previously addressed in this circuit. The district court was at first inclined to order such a reduction, but declined to do so when the Court of Appeals for the Ninth Circuit held to the contrary, reversing a district court judgment in Shellman v. United States, Inc. 528 F2d 675 (9th Cir. 1975). We respectfully do not agree with the Ninth Circuit, and now hold that a mere equitable distribution of liability, and one more consistent with the amended act, is achieved by limiting the vessel owner's liability to the extent of its fault in this case $20,000, plus the amount of the stevedore's lien as set forth below.[3a]

3a. While the issue was expressly reversed, the Third Circuit recently discussed some of the authorities and policy pros and cons of allowing a jointly negligent vessel an equitable credit to the extent of the stevedore's fault in Marant v. Farrell Lines, Inc., No. 76-1383 (3d Cir. 1977) (compare majority and concurring opinions and authorities cited).

I

Edmonds' duties aboard the Atlantic Cognac on the day of his injury consisted of removing chains and jacks used to secure large, movable cargo containers in the hold of the vessel. At the direction of a member of the vessel's crew, Edmonds went behind one of the containers to remove a jack. The rear of the container was about two feet from the side of the ship. As Edmonds was performing this task, a vehicle called a hustler, used to tow the rolling containers off the ship, attempted to engage the container that Edmonds was working behind, causing it to roll backward. Edmonds was pinned between the container and the side of the ship. His allegations of negligence on the part of the vessel consisted of permitting the rolling containers to be loaded on the Atlantic Cognac by stevedores at Rotterdam without applying the

containers' air brakes, and ordering Edmonds to remove the jack from behind a container while a hustler was ready to engage it.

[2,3] Defendant's motion for a new trial centered around two instructions given the jury by the district court, one of which is copied below.[4] It is necessary to discuss only the first of these, Charge A, which instructed that "defendant has the duty of seeing that the cargo is properly stowed."

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4. "Charge A--A vessel owner, under admiralty law, owes the duty of exercising ordinary care toward all persons lawfully aboard the vessel, and the defendant has the duty of seeing that the cargo is properly stowed and he is charged with whatever knowledge it, the defendants, would have acquired as to the nature and characteristics of the cargo carried on the vessel by the exercise of ordinary care to acquaint themselves with the facts, and the defendant was bound to take reasonable precautions in light of such knowledge to protect longshoremen like the plaintiff, Stanley D. Edmonds, who was employed to assist in unloading the cargo."

The district court was not in error in concluding that this charge could be understood as imposing upon the vessel a duty that is no longer permissible under the 1972 amendments to the Longshoremen's Act. As we held in Bess v. Agromar Lines, 518 F2d 738 (4th Cir. 1975), a non-delegable duty to provide a safe place to work is an "outgrowth of the doctrine of seaworthiness and differs significantly from the concept of negligence." 518 F2d at 740 (citations omitted). The 1972 amendments expressly abolished the seaworthiness concept as a basis for imposing liability upon a vessel for injuries to a longshoreman.[5] Only negligence remains under the statute as a basis for such liability, the same duty to exercise ordinary care as in land-based injury cases.[6]

5. 33 U.S.C. Sec. 905(b). See note 2, supra.

(Footnote from page A29)

6. It was the intent of Congress in 1972 to place vessels "in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits." H.R. Rep. No. 92-1441 92d Cong. 2d Sess. (1972), 1972 U.S. Code Cong. & Admin. News at p. 4703.

The stowage of the cargo at Rotterdam was under the exclusive control of the Dutch stevedore. There was no evidence of knowledge on the part of the defendant of any dangerous condition, nor that, in the exercise of ordinary care, such knowledge should have been acquired. The instruction that "defendant has the duty of seeing that the cargo is properly stowed" could easily have had the effect of subjecting the vessel to an outmoded theory of liability, that of a non-delegable duty of providing a safe place to work. See Bess, supra. In these circumstances, the grant of a new trial was entirely proper. The district judge was in a better position than are we to judge the meaning and connotation of the words of his own instruction when read in context with the balance of the charge, and we cannot say setting aside the verdict was an

abuse of discretion.

II

[4] In the 1972 amendments, Congress sought to strike a balance between the relative rights and liabilities of the three parties generally involved in litigation under the Longshoremen's Act, the injured longshoreman, his stevedore employer, and the owner of the vessel. While statutory compensation payments (increased considerably in 1972) constitute the stevedore's exclusive liability to its injured employee, irrespective of fault,[7] a vessel whose negligence was a proximate cause of the injury may be held liable to the longshoreman for damages.[8]

In contrast to pre-1972 practice,[9] the vessel is no longer subject to suit

7. 33 U.S.C. Sections 904, 905(a).

8. 33 U.S.C. Section 905(b).

9. A more thorough analysis than will be

(Footnote 9 continued from Page A31)

attempted here of the Act prior to 1972, as well as of the historical backdrop of admiralty law against which the Act has operated, can be found in Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974). See also Shorter, In the Wake of the 1972 Amendments to the L. & H.W.C.A.:the Vessel's Rights Against the Stevedore, 7 J. of Maritime Law and Commerce 671 (1976); Cohen and Dougherty, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation, 19 N.Y.L. Forum 587 (1974).

by a longshoreman for breach of a warranty of seaworthiness, an absolute, non-delegable duty to provide a safe place to work.[10] See Bess, supra. It is liable only for its own negligence. And, in return, the negligent vessel may no longer bring suit against the stevedore whose joint negligence contributed to the injury based on breach of a warranty to perform duties in a workmanlike manner. Such suits had been held not to be precluded by the exclusivity provision of 38 U.S.C. Section 905(a), as the statute was then written, in Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124, 76 S.Ct. 232, 100 L. Ed. 133 (1956). It was the intent of the 1972 amendments to eliminate this circuitous system of litigation and to restore to the stevedore

10. The availability of relief against a vessel on account of a vessel's unseaworthiness was extended to longshoremen performing work aboard ship in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

the exclusivity of liability for compensation payments under the statute only. See H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. and Admin. News, p. 4698.

[5] It is this remedial exclusivity, however, that gives rise to the present problem of whether and how to apportion liability in cases in which the stevedore and the vessel are jointly negligent in causing the injuries sued upon. While admiralty law has, over the years, demonstrated considerable flexibility in adapting to rules of divided damages when more than one party has been at fault in causing injury, Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., 417 U.S. 106, 110, 94 S.Ct. 2174, 40 L. Ed. 2d 694 (1974), such a rule may not obtain when one wrongdoer enjoys statutory immunity. The Longshoremen's Act does not provide for contribution against

a jointly negligent stevedore, and the Supreme Court has held that to engraft such a remedy judicially could disrupt the balance of rights and liabilities Congress sought to achieve in the statutory scheme. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952); see Cooper Stevedoring, supra. Therefore, under the statute, if the 20% negligent vessel in the present case were held liable for the full $90,000 jdugment, it would have no recourse against the 70% negligent stevedore.

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11. Cooper Stevedoring made clear that the rule of noncontribution enunciated in Halcyon is limited to cases in which the party against whom contribution is sought enjoys a statutory immunity from tort liability. Thus, contribution was permitted against a stevedoring company which was a joint tortfeasor, but which was not the employer of the injured longshoreman and therefore had no statutory liability or immunity.

Cooper arose before the 1972 amendments, but in dicta it indicates that even after those amendments the Halcyon days are not over and the case remains "good law on its facts."

[6] In eliminating the vessel's cause of action in contract against the stevedore approved in Ryan, Congress intended as a quid pro quo that vessels sued under the Act would no longer be liable for the negligence of stevedores, as they often had been pursuant to the seaworthiness doctrine. It was accordingly perceived that the Ryan action would no longer be necessary.[12] The House Report discussing elimination of unseaworthiness as a basis of liability reflects this Congressional determination that the liability of a vessel was to be

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12. "Since the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Admin. News at p. 4704.

confined to its own negligence.[13] Congress did not intend to continue to subject vessels to liability for the negligence of stevedores, while eliminating their only available means of recourse.

We fail to see how a simple reduction in a vessel's monetary liability will result in the type of circuitous actions Congress sought to eliminate in 1972, as was suggested by the court in Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974). Nor do we accept the proposition advanced by the Ninth Circuit in Shellman, supra, that an equitable credit somewhat like we adopt here imposes an unjustified

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13. "Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-created doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act." Id. at p. 4703.

burden on injured longshoremen. They have no inherent right to recover from a vessel damages caused by the negligence of a stevedore. To the extent the longshoreman receives a somewhat lesser amount than he otherwise would have, his complaint lies not with the result reached in this case, but more basically with the compensation scheme of the Act that prevents him from recovering damages from his employer, for a concomitant of the stevedore's no-fault liability is the exclusivity of the compensation remedy against it. Thus, even as the longshoreman receives a lesser recovery, he benefits from one of the Act's many trade-off; he becomes entitled to statutory benefits without having to prove fault on the part of anyone. As will be later apparent, he also benefits from the negligence of the vessel, but only to the extent of its own fault.

It has also been suggested that any reduction of liability to the benefit of a negligent vessel would amount to a form of contribution against the jointly negligent stevedore prohibited by the Supreme Court in Halcyon. See Shellman, supra; Landon v. Lief Hoegh & Co., 521 F2d 756 (2d Cir. 1975). The only apparent circumstance in which this could be true would be where the ability of the stevedore to recoup its compensation lien,[14] acquired pursuant to its right of statutory or equitable subrogation in the plaintiff's recovery, see The Etna, 138 F2d 37 (3d Cir. 1943), would be diminished on account of the vessel's reduced liability to less than the amount of the lien as apparently may be true here. Our solution also avoids that result except when the total longshoreman's

14. Compensation payments made to the plaintiff prior to judgment.

judgment is less than the lien. Cf. Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 89 S.Ct.1144, 22 L. Ed. 2d 371 (1969). See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953).

While the stevedore is not a party to this case, its lien looms large in any decision we may make here. This is so because the statute, 33 U.S.C. Section 933(b), provides that, after an award, acceptance of compensation by the longshoreman operates as a statutory assignment of all the right of action of a longshoreman against the vessel unless the longshoreman shall commence an action against the vessel within six months after the award, and the rule of The Etna, supra, which seems generally accepted, provides for the equitable subrogation of a stevedore, to the extent of compensation payments made, in any recovery made by

the longshoreman against the vessel in all events. If we were left purely to our own devices, an attractive holding might be to bar the stevedore from asserting an equitable lien if it were negligent, but we think this would be an artificial distinction to announce such a rule when the statute has in terms provided for an assignment after an award in some instances. Such a holding by us might well lead to the stevedore's withholding of voluntary payments after an injury, knowing that after an award its lien would at least many times in effect be perfected by statute. Again, were the much older form of procedure still in effect, that the longshoreman had to elect which remedy to pursue, we might have less difficulty with the case, for a voluntary election on the part of the longshoreman might justify lowered payments to him which otherwise might seem

to be an injustice. Under 33 U.S.C. Section 933(a), however, the longshoreman "need not elect."

[7] In arriving at our decision, we first have to keep in mind the statute. 33 U.S.C. Section 933(b) preserves a lien to the stevedore in many instances. See also The Etna, supra. 33 U.S.C. Section 905(b), as amended in 1972, preserves to the longshoreman a right "caused by the negligence of a vessel." We think the stevedore's lien and the right against the vessel for negligence should be preserved and should not be diminished so far as possible except by the longshoreman's contributory negligence. We do not think the statute contemplates a reduction of the stevedore's lien on account of its contributory negligence.

With these principles in mind, we think that two recent cases offer a

solution to the problem which is consistent with the intent of the statute, that is to say the preservation of the stevedore's lien the preservation of the longshoreman's right of action for negligence against the vessel, and holding of the vessel only for its own negligence. The cases are Cooper, supra, and United States v. Reliable Transfer Company, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975).

[8] Both of those cases trace the history of damages in admiralty cases more thoroughly than we will do here. Suffice it to say that we read them as emphasizing that courts of admiralty should formulate "flexible and fair remedies in the law maritime," Reliable Transfer, p. 409, 95 S.Ct. p. 1715. And in Cooper the court states: ". . . it is fair to say that application of the rule of damages between joint tortfeasors

in admiralty cases has been as broad as its underlying rationales." pp. 110-11, 94 S.Ct. p. 2177.

In the Cooper case, the court approved a divided damage award between a negligent vessel and a negligent stevedore when the longshoreman plaintiff was not an employee of the negligent stevedore. It is true that in Cooper the division of negligence by the court between the stevedore and the vessel was half and half, but that case followed the well established maritime rule of an equal division of damages upon a finding of concurrent fault, the law maritime at that time, and in all events in note 3 the court recited that the district court had divided the damages equally because it was "the only apportionment of fault it could reach on the evidence," and reserved the question of whether contribution should be based on an equal

division of damages or should be relatively apportioned with the degree of fault.

Following Cooper came Reliable Transfer which departed from the traditional law maritime of an equal division of damages in cases of contributory fault and decided that in a collision or standing case "liability for such damages is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault, or when it is not possible fairly to measure the comparative degree of their fault," p. 411, 95 S.Ct. p. 1715.

[9,10] With those cases in mind, and keeping in view the statutory objectives and the Supreme Court opinions on the subject, we think the most just result in this case obtained, and one which

is quite in keeping with the principles which we have cited, is one in which we preserve the stevedore's lien, we preserve the longshoreman's right of action against the vessel for negligence, both contemplated by the statute, and, so far as possible, only hold the vessel for its own negligence.

Accordingly, we are of opinion that a judgment against a vessel by a longshoreman in a case such as we have here, where both the vessel and the stevedore are negligent, should be limited to a sum equal to that part of the whole measured by its own fault, here $20,000, plus any valid lien the stevedore may have on the recovery by the longshoreman, but of course not to exceed the whole amount of the possible award against the vessel, which here, for example, is $90,000. Since the stevedore has asserted no claim against the vessel, we do not

consider any effect the 1972 amendments may have had on Marine Terminals, supra.

The judgment of the district court is accordingly vacated and the case is remanded with directions to enter judgment against the vessel in favor of the longshoreman in the amount of $20,000, and in the event, and only in the event, the stevedore asserts and proves in the district court a valid lien on the recovery of the longshoreman, to enter such additional judgment in favor of the longshoreman against the vessel in such amount, however subject to the lien of the stevedore.[15]

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15. The total of the stevedore's lien and the $20,000 judgment in favor of the longshoreman here will be less than $90,000, so we have no occasion to consider the result in the event they are greater.

Our result here is not inconsistent with Halcyon because we have not required contribution from the stevedore, and with Pope & Talbot because any reduction in the vessel's liability is not at the expense of the stevedore.

VACATED AND REMANDED

HALL, Circuit Judge, dissenting:

Respectfully, I dissent. It appears that the majority opinion is based upon principles of justice, equity, and fairness, instead of the provisions of the Act. The district court was correct in entering judgment for the plaintiff against the vessel owner only for the entire sum of $90,000 because the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq. (especially 33 U.S.C. Section 905(b) are clear and require this result. Even if the present rule is arguably a harsh one, the change should come from Congress, not the courts. See Marant v. Farrell Lines, Inc., 550 F2d 142 151-152 (3rd Cir. 1977, Van Dusen concurring).

Under the Act, as amended, the ship is to bear the entire responsibility for

both its liability and that of the stevedore-employer.

I would, therefore, affirm. Dodge v. Mitsui Shintaku Ginko, 528 F2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed. 2d 188 (1976); Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936, 96 S.Ct. 1668, 48 L.Ed. 2d 177 (1976); Marant v. Farrell Lines, Inc., supra, (dicta-Van Dusen concurring).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STANLEY EDMONDS,
Appellee,

vs. Nos. 76-1545
76-1546
COMPAGNIE GENERALE 76-1547
TRANSATLANTIQUE,
Appellant

Decided June 22, 1978

HAYNSWORTH, Chief Judge:

We have for decision the question of pro ratior of damages payable by a shipowner to an injured longshoreman when the injury was ocassioned by the combined negligence of the shipowner, the stevedore and the injured longshoreman. Our conclusion is that the ship may be required to pay that proportion of the total damages which matches its proportion of fault. We do not now decide what interest the stevedore has in the longshoreman's recovery, for the stevedore is not now a party to these proceedings.

I

While working as a longshoreman aboard a ship owned by Compagnie Generale Transatlantique, Edmonds was severely injured. A first trial resulted in a verdict in Edmonds' favor, but the district judge awarded a new trial because of errors in the charge. A second trial again resulted in a verdict in Edmonds' favor, and the damages were assessed at $100,000. The jury determined that the injuries were the result of concurrent negligence on the part of the stevedore, the ship and the longshoreman; the stevedore's negligence contributed 70% of the fault, the ship's 20% and the longshoreman's 10%.

With these determinations by the jury, the district judge concluded that the longshoreman was entitled to a judgment against the shipowner in the amount of $90,000. Because the

longshoreman himself was found to have been 10% at fault, the $100,000 damage assessment was reduced by 10%. No reduction was allowed on account of the negligence of the stevedore.

The case was initially heard by a panel of this court. A majority of the panel held that the damage assessment should be further reduced on account of the contributory fault of the stevedore to the sum of $20,000, computed on the basis of the ship's contribution to the total fault, plus any amount which the stevedore should recoup from the longshoreman by virtue of the lien in its favor as a result of having made compensation payments to the longshoreman. A majority of the judges in regular active service voted for rehearing en banc, and a majority of the en banc court now concludes that the shipowner can be required to pay no more than $20,000.

Before 1972 the exposure of ships to liabilities for injuries to longshoremen was comparatively slight except insofar as reparations for such injuries occasioned higher stevedoring costs. The ship was held to owe to a longshoreman a duty to provide a seaworthy ship, comparable to its duty to seamen, but if the unseaworthy condition had been created by the stevedore, the ship was entitled to indemnity from the stevedore under an implied warranty of workmanlike service. See Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co. Inc. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

Under that state of the law, heavy costs were imposed upon the stevedore. It was required to provide workmen's compensation benefits to an injured longshoreman in any event, and if the longshoreman sued the ship and was

successful in obtaining a verdict on the basis of an unseaworthy condition created by his fellow workers, the stevedore was required to indemnify the ship, in effect paying to its employee the damage award.

In 1972 the Congress decided to change that. It amended the Longshoremen and Harbor Workers' Compensation Act by greatly increasing the amount of benefits payable, without regard to fault, to injured longshoremen. It abolishes the longshoreman's right of action against the ship on unseaworthiness claims, and it abolished the ship's right of contribution or indemnity from the stevedore. The right of action against the ship for injuries caused by the ship's own negligence, however, was expressly preserved, and the apportionment of the damages problem we face is the consequence of that preservation.

The critical section of the amended

statute is Section 905(b)[1] which reads:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reasons thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available

1. 33 U.S.C. Section 905(b).

under this chapter.

If read in absolute terms, the first sentence and the second sentence are in conflict in every case in which fault is found on the part of both the ship and the stevedore. The first sentence says that if the injury is caused by the negligence of a vessel the longshoreman may recover, but the second sentence says he may not recover anything of the ship if his injury was caused by the negligence of a person providing stevedoring services. The sentences are irreconcilable if read to mean that any negligence on the part of the ship will warrant recovery while any negligence on the part of the stevedore will defeat it. They may be harmonized only if read in apportioned terms. The evident meaning and intention of the Congress was to provide for liability of the ship to the extent its fault contributed to the

injury, while insulating it against liability to the extent that the stevedore's fault contributed to the injury. So read, the sentences are harmonious.

The longshoreman, looking to the many references in the statute and its legislative history to the principles of land based negligence law, would import into those references those principles of the common law which permit full recovery by an injured plaintiff against any single joint tort feasor, but that common law doctrine is mitigated in many states by the provision of rights of contribution or of indemnity from other joint tort feasors, or has been supplanted by a system of comparative negligence. In the 1972 amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore, and it is hardly rational to suppose that, without any

right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedore very greatly so. More importantly, the second sentence of Section 905(b) seems a firm declaration that the ship should not be required to pay for injuries to the extent that they were caused by people providing stevedoring services.[2]

2. There is nothing explicitly enlightening in the legislative history. The many references in the history to the principles of land-based negligence law are a slender reed upon which to base an inference of Congressional intent for the importation of the common law principle of complete responsbility on the part of each of several joint tortfeasors. The more likely inference from that language is a complete negation of the non-delegable duities concepts of admiralty law whether or not framed in terms of warranties of seaworthiness. See Hurst v. Triad Shipping Co., 554 F2d 1237, 1247-1253 (3rd Cir. 1977). Thus, it was repeatedly emphasized that the vessel would be chargeable only with its own negligence and that it would not be chargeable with

(Footnote 2 continued on Page A57a)

(Footnote 2 continued from Page A57)

the negligence of the employees of the stevedore. H.R. Rep. No. 92-1441, U.S. Code Cong. & Adm. News, 92d Congres. 2d Sess. 4698, 4703, 4704 (1972). The language of the House Report strongly suggests an intention that the vessel be responsible only for its proportionate part of any negligence when there is also fault on the part of others. See Vickery, Some impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 41 Ins. Counsel J. 63, 66 (1974). This reading of the legislative history suggests that Congress made a reasonable trade-off, in which the vessel's liability was limited to its proportion of the fault while in return the vessel owner was absolutely deprived of all rights of indemnity by or contribution from the stevedore.

Our conclusion is consistent with the trend to expand the application of the doctrines of comparative negligence, and is reinforced by the policy considerations which underly that expansion. Those considerations were eloquently stated by Mr. Justice Stewart in his opinion for the Court in United States v. Reliable Transfer Co., 421 U.S.397 (1975). We need not repeat them here, but they are wholly consistent with a reasonable reconciliation of the first sentence of Section 905(b) and its successors.

From the longshoreman's point of view, this is not a harsh result. He is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury. Our holding

is only that he may not recover from the ship damages attributable to the neglect or actions of his fellow longshoremen or others than the ship's crew.

We are aware, of course, that our decision today is in conflict with decisions in the Fifth and Ninth Circuits, see Samuels v. Empresa Lineas Maritimas Argentinas, ____F2d ____ (5th Cir. May 26, 1978); Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936 (1976). Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976). See also Hubbard v. Great Pacific Shipping Co. Monrovia, 404 F.Supp (1242) (D. Ore. 1975); Santino v. Liberian Distance Transports, Inc., 405 F. Supp. 34 (W.D. Wash. 1975); Solsvik v. Maremar Compania Naviera, S.A., 399 F.Supp. 712 (W.D. Wash. 1975). But see Croshaw v. Koninklijke Nedlloyd,

B.V. Rijswijk, 398 F.Supp. 1224 (D.Oregon 1975) and its discussion of the comparative negligence and "equitable credit" doctrines.

II

The parties urge us to decide the next and related question of the rights of the stevedore to the $20,000 fund payable by the ship as a result of our decision. It has a statutory lien upon the fund as a result of its payment of workmen's compensation benefits, and its rights as lienor may be or may not be subject to adjustment as a consequence of the fact that the verdict was reduced to the extent that the stevedore's fault contributed to the injury. But the stevedore is not a party in this case and has not been heard from. The answer to the question will affect the stevedore involved here and other stevedores very

substantially, and its rights should not be adjudicated without its presence.

We suggest that the shipowner pay the $20,000 fund into the court and interplead the stevedore and the longshoreman so that their relative rights might be determined in a proceeding in which each may be heard. In future cases, the stevedore might be made a party plaintiff so the rights of all parties may be adjudicated in one proceeding.

III

Edmonds appeals from the decision of the district court to grant a new trial after the initial verdict in his favor. We find no error in that decision and affirm it.

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded for the entry of judgment against the ship consistently

with this opinion.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

I respectfully dissent.

The legislative history of the 1972 amendments to the L. & H.W.C.A. reveals beyond peradventure that congress intended to make a shipowner responsible for negligent injury to a longshoreman working aboard ship in the employ of a stevedore to the same extent a property owner on land would be responsible to an employee of his independent contractor.

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
> . . . .
>
> The purpose of the amendments is to place an employee injured aboard a vessel in the

> same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned . . . .
>
> . . . .
>
> The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land . . . .
>
> . . . .
>
> In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury.

H. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4703-05.

The 1972 amendments to the L.&H.W.C.A., among other things, did the following: (1) increased employee's level of benefits, (2) eliminated the liability of

the shipowner for warranty of seaworthiness, (3) placed the injured employee in the same position as an employee injured in non-maritime employment ashore, and (4) gave the employer-stevedore a statutory lien against plaintiff's recovery.

The first sentence of Section 905(b) gives the employee a cause of action for negligence against the vessel. To recover, injury need not be caused solely by the negligence of the vessel, but may be based on any negligence which was a contributing proximate cause. This is not different from the right a land-based employee would have against the land owner. (Maritime law does give a shipowner the right to a reduction to the extent of the plaintiff's comparative negligence, 10% or $10,000 in this case.)

The second sentence is not in conflict with the first, but simply says

that the plaintiff may not base his claim against the shipowner upon the negligence of the stevedore. This provision, likewise, is in line with land-based law, and is in perfect alignment with the first sentence which gives a right of action against the vessel for its own negligence. It is to be remembered that the longshoremen's workmen's compensation benefits do not depend upon the negligence of the stevedore, but, like workmen's compensation benefits for landbased workmen, are paid for injuries received on the job without proof of fault.

The common law did not permit division of damages among tortfeasors according to degrees of comparative negligence, and such change in the law should not come from the courts. Some common law states, by legislation, do permit comparative negligence among tortfeasors, but they are in the minority. Prosser,

Law of Torts Section 67, at 434-35 (4th Ed 1971).

The 1972 amendments eliminate any right the vessel may have to recover over against its stevedore for damages it may have to pay to an injured longshoreman for injury aboard ship. The effect of this is to prevent contribution by the stevedore or diminution to the longshoreman for any benefits he may receive from the stevedore.

In the matter of the stevedore's lien, I believe that the stevedore, even though negligent, has the right to be compensated out of the recovery by the longshoreman and that he has a compensation lien protecting that right.

The majority opinion seeks to obtain the "most just result." I have no quarrel with a just result; however, it is not to be achieved in face of a constitutional act of congress. If

inequities result from this statute, perhaps congress will make necessary changes to bring about more equitable results.

The district court decided this case in line with the decisions in Shellman v. United States Lines, Inc., 528 F2d 675 (9th Cir. 1975), and Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F2d 669 (9th Cir. 1975). I believe these decisions are correct. See also Hurst v. Triad Shipping Co., 554 F2d 1237 (3rd Cir. 1977).

Finally, the majority's decision to depart from the established law created by congress and interpreted by our sister circuits has profound practical and policy considerations for all parties to maritime injuries - the longshoreman, the stevedoring company and the vessel owner.

For the longshoreman himself, the amount of his tort recovery now becomes

totally dependent on a new and judicially created "situs test." From the border of Washington State past Texas, Louisiana, and north to Georgia, and from Delaware to Maine, the injured longshoreman recovers a full award against a vessel, reduced only by his own contributory negligence. The maritime areas of the states which comprise the Fourth Circuit now stand alone in their reduction of the longshoreman's damage award due to the negligence of the stevedoring company.

For the shipowners and stevedores, the result becomes equally anomalous. Shipowners, stevedoring companies and presumably the insurance industry which stands behind shipping, no matter where they are based, must all wear two hats -- one for all shipments in every other judicial circuit but ours and a very special hat for the Fourth Circuit and

its shipping ports.

Thus, much much more than a technical difference between our sister circuits is involved; this dispute should be resolved for the benefit of all parties, small and large alike.

I would affirm.

WIDENER, Circuit Judge, dissenting:

I would decide the case in accordance with the previous opinion of the majority of the panel found in 558 F2d 186 (4th Cir. 1977).

FILED
OCT 15 1978
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,
Petitioner

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I N D E X

Subject Index

	Page
Preliminary Statement	1
Interest of Amicus Curiae	2
Interest of Amicus in Longshoremen's Act Cases Generally .	2
Interest of Amicus in Case at Bar	5
Reasons for Granting Writ	7
1. The Decision Below Is In Conflict With Numerous Decisions In Other Circuits.	7
2. The Decision Below Is In Conflict With Decisions Of This Court.	9
3. The Instant Case Involves An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.	11
Conclusion.	12

CITATIONS

Cases

	Page
Adkins v. I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company, 433 U.S. 904 (No. 76-730, October Term, 1976)	9
The Etna, 138 F.2d 37 (3 Cir. 1943)	6
The George Washington & The Gregory, 76 U.S. (9 Wall.) 513 (1870)	10
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952)	10
Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977)	8

Other

33 U.S.C. §901 et seq.	2
36 D.C. Code §501 et seq.	2
U.S. Code Cong. & Adm. News, 92d Cong., 2d Sess. 4698, 4701-4705 (1972)	11

IN THE SUPREME COURT
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October Term, 1978

No. 78-479

STANLEY D. EDMONDS, Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE, Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Liberty Mutual Insurance Company, amicus curiae, submits this Brief in Support of the Petition for Writ of Certiorari, with the written consent of the parties which is filed herewith.

INTEREST OF AMICUS CURIAE

Interest of Amicus in Longshoremen's Act Cases Generally

Liberty Mutual Insurance Company, a Massachusetts corporation with its principal office at 175 Berkeley Street, Boston, Massachusetts, is a mutual company writing property and casualty insurance, including workmen's compensation coverage, in each of the United States. It writes a substantial amount of workmen's compensation coverage under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. and under the identical District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 et seq.

As of June 30, 1978, amicus had on its books 1,272 active claims under the Longshoremen's and Harbor Workers' Compensation Act. The Combined Reserves carried by amicus on these claims totaled $38,687,167. This represents the esti-

mated "value" of these claims.

These 1,272 claims were carried by amicus in its offices in the following states:

Maine	Louisiana
Massachusetts	Texas
Rhode Island	California
Connecticut	Oregon
New York	Washington
New Jersey	Hawaii
Pennsylvania	Kentucky
Delaware	Tennessee
Maryland	Ohio
Virginia	Illinois
North Carolina	Michigan
South Carolina	Minnesota
Georgia	Arkansas
Florida	Oklahoma
Alabama	

As of June 30, 1978, amicus had on its books 1,151 active claims under the District of Columbia Workmen's Compensation Act. The Combined Reserves carried by amicus on these claims totaled $30,324,786.

It is apparent from these data that amicus has a very substantial interest in any matter involving the interpretation

and application of the Longshoremen's and Harbor Workers' Compensation Act. More specifically, any decision which, like that of the Court of Appeals below, limits the recovery by an insurance carrier from a third party of its "workmen's compensation lien" is of direct and important interest to amicus.

As so pithily stated by the dissenting judge below (App. 67-68), the law applicable in cases such as this is, as a result of the decision below, different in the States of Maryland, West Virginia, Virginia, North Carolina and South Carolina (the Fourth Circuit) from the law in all other states. It is therefore relevant to note that as of June 30, 1978, amicus had on its books 403 active claims under the Longshoremen's and Harbor Workers' Act in its offices located in the states of the Fourth Circuit. The Combined Reserves

carried by amicus on these claims totaled $11,856,332.

Of course not all of the claims enumerated above involve actions by employees against third parties, as in the instant case; and not all of the third-party cases involve fact situations which, as here, impinge directly upon the right of an insurance carrier to recover its full workmen's compensation lien. Nevertheless, the figures provide a good measure of the involvement of amicus in this whole area of federal workmen's compensation law.

Interest of Amicus in Case at Bar

Although not identified as such in the record, amicus was the insurance carrier for the employer of Stanley Edmonds, Petitioner, at the time of his injury. He made a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, and amicus has paid such benefits to

him. As of September 25, 1978, medical benefits plus compensation for temporary total and permanent partial disability resulting from the accident have been paid to Petitioner in the total amount of $46,943.39. Payment of workmen's compensation continues at the rate of $184.07 per week.

On the basis of established law amicus would have a lien against any recovery by Petitioner in this action to the extent of benefits paid, namely $46,943.39 as of September 25, 1978. See, e.g., The Etna, 138 F.2d 37 (3 Cir. 1943). (For present purposes we disregard the question of liability for attorneys' fees and other legal expenses.)

Petitioner in this case seeks a recovery of $90,000.00 ($100,000 damages reduced 10% for his contributory negligence). Respondent denies liability for

more than $20,000, being 20% of the damages, based upon the jury's finding that Respondent's negligence contributed 20% to the accident. It is thus apparent that if Petitioner prevails in this Court amicus should recover $46,943.39 plus the amount of future benefits paid, whereas if Respondent prevails amicus would recover only $20,000 (again disregarding attorneys' fees). The Court of Appeals left open the question as to how much of the lien would actually be recoverable.

Thus amicus has not only a general interest in the outcome of this case but a specific, direct interest.

REASONS FOR GRANTING WRIT

1. The Decision Below Is In Conflict With Numerous Decisions In Other Circuits.

The conflict between the decision below and decisions of the Courts of Appeals for the Second, Fifth and Ninth Circuits

has been fully demonstrated in the Petition (pp. 8-17). In fact, as pointed out by the dissenting judge below (App. 67-68), the interpretation of the 1972 Amendments to the Longshoremen's Act decreed by the Fourth Circuit differs from the interpretation accorded to the Act by every other court which has considered the question. This situation alone should justify the granting of the Writ.

This Court has recently granted certiorari (and rendered a decision) in a case involving another aspect of the 1972 Amendments to the Longshoremen's Act. Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977). The reasons for granting that writ were the same as the reasons present here. Not only was the question of statutory interpretation a matter of important federal law, but also there was a striking conflict between the

Circuits. The Fourth Circuit (en banc as here) had adopted the employer's interpretation, whereas the First, Second and Fifth Circuits had adopted that suggested by the employees. This Court granted the petition and ultimately accepted the majority view and reversed the Fourth Circuit. Adkins v. I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company, 433 U.S. 904 (No. 76-730, October Term, 1976) (amicus was a respondent in that case).

2. The Decision Below Is In Conflict With Decisions Of This Court.

Several conflicting decisions of this Court have been cited in the Petition (pp. 17-20). In addition, it should be noted that the decision below holds, in effect, that the 1972 Amendments to the Longshoremen's Act sub silentio overruled, in personal injury and death suits involving

actions by longshoremen and harbor workers, the well-established principle of maritime (and common) law known as "joint and several liability". E.g. The George Washington & The Gregory, 76 U.S. (9 Wall.) 513 (1870). This principle (which, incidentally, is also recognized in property damage cases) was embodied in the case of Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). There a vessel owner found 25% at fault was required to pay 100% of the damages suffered by an injured longshoreman. Although the Reports of the Senate and House Committees accompanying the Bill which became the 1972 Amendments to the Longshoremen's Act cited numerous decisions of this Court which it intended to overrule or to limit, no mention was made of Halcyon or of an intent to alter or abolish the established principle of joint and several

liability. See U.S. Code Cong. & Adm. News, 92d Cong., 2d Sess. 4698, 4701-4705 (1972). Amicus submits that if the statute is to have that effect, as held by the Court below, the abolition of this fundamental principle of maritime law should be made by this Court and not by an inferior court.

3. The Instant Case Involves An Important Question Of Federal Law Which Has Not Been But Should Be Settled By This Court.

Amicus adopts Petitioner's discussion of this point (pp. 20-24). In addition, amicus points out that to it the resolution of the conflict between the Circuits and of the dispute as to the meaning of the 1972 Amendments to the Longshoremen's Act is a matter of more than academic interest. On the contrary the present uncertainty as to the proper interpretation of the statute is a matter of daily busi-

ness concern. Taking as examples the neighboring ports of Charleston, South Carolina (Fourth Circuit), and Savannah, Georgia (Fifth Circuit), amicus must, potentially at least, underwrite Longshoremen's Act coverage on a different basis in the two ports. Claims with third-party aspects must be adjusted, settled or litigated differently in the two ports. Other things being equal, coverage in Charleston will be more expensive than in Savannah.

CONCLUSION

Amicus submits that a federal statute, particularly one involving maritime commerce, should have a uniform interpretation and application throughout the nation. Therefore this Court should grant the Petition and pronounce an authoritative interpretation of the Longshoremen's Act insofar as it is involved in the instant case.

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Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN EXPORT LINES, INC.; AMERICAN TRADING TRANSPORTATION CO., INC.; CENTRAL GULF STEAMSHIP CORPORATION; CROWLEY MARITIME CORP.; DELTA STEAMSHIP LINES, INC.; FARRELL LINES INCORPORATED; GULF OIL CORPORATION; THE HANNA MINING CO.; HUDSON WATERWAYS CORP.; INTERNATIONAL OCEAN TRANSPORT CORP.; INTERSTATE OIL TRANSPORT CO.; LAKE CARRIERS' ASSOCIATION; LYKES BROS. STEAMSHIP CO., INC.; MARINE TRANSPORT LINES, INC.; MARITIME OVERSEAS CORPORATION; MOORE-McCORMACK LINES, INC.; MOUNT SHIPPING, INC.; NATIONAL TRANSPORT CORP.; OGDEN MARINE, INC.; PUERTO RICO MARINE MANAGEMENT, INC.; SEA-LAND SERVICE, INC.; VANCOR STEAMSHIP CORP.; WATERMAN STEAMSHIP CORP.; and PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
INTEREST OF AMERICAN EXPORT LINES, INC., ET AL.	2
REASONS FOR GRANTING THE WRIT	3
I. There is a sharp conflict between circuits	3
II. Prior decisions of this Court are in apparent conflict	6
CONCLUSION	8
Annexed to Brief as Exhibit 1: Consent to the filing of brief by American Export Lines, Inc., et al., as amici curiae	App.

TABLE OF CITATIONS

Cases

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974)	6, 7
Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224 (D. Ore. 1975)	5
Dawson v. Contractors Transport Corp., 467 F.2d 727 (D.C. Cir. 1972)	4
Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976)	4, 6, 7
Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153 (4th Cir. 1978)	3, 4
Frasca v. Prudential-Grace Lines, Inc., 1975 A.M.C. 1130, 1143 (D. Md. 1975)	5
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952)	6, 7
Hubbard v. Great Pacific Shipping Co., Monrovia, 404 F. Supp. 1242 (D. Ore. 1975)	5

PAGE

Landon v. Lief Hoegh and Co., Inc., 521 F.2d 756 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) 6

Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968) 4, 5

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 6, 7

Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978) 4, 6-7

Shellman v. United States Lines, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) 4, 5, 7

Shellman v. United States Lines Operators, Inc., 1975 A.M.C. 362 (C.D. Cal. 1974) 5

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 5, 7, 8

Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2nd Cir. 1978) 6, 7

Statutes

33 U.S.C.A. § 901 *et seq.* (1976 Supp.), *amending* 33 U.S.C. § 901 *et seq.* (1970) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN EXPORT LINES, INC.; AMERICAN TRADING TRANSPORTATION CO., INC.; CENTRAL GULF STEAMSHIP CORPORATION; CROWLEY MARITIME CORP.; DELTA STEAMSHIP LINES, INC.; FARRELL LINES INCORPORATED; GULF OIL CORPORATION; THE HANNA MINING CO.; HUDSON WATERWAYS CORP.; INTERNATIONAL OCEAN TRANSPORT CORP.; INTERSTATE OIL TRANSPORT CO.; LAKE CARRIERS' ASSOCIATION; LYKES BROS. STEAMSHIP CO., INC.; MARINE TRANSPORT LINES, INC.; MARITIME OVERSEAS CORPORATION; MOORE-McCORMACK LINES, INC.; MOUNT SHIPPING, INC.; NATIONAL TRANSPORT CORP.; OGDEN MARINE, INC.; PUERTO RICO MARINE MANAGEMENT, INC.; SEA-LAND SERVICE, INC.; VANCOR STEAMSHIP CORP.; WATERMAN STEAMSHIP CORP.; and PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

American Export Lines, Inc., et al., have obtained the consent of the parties to file a Brief in Support of the

Petition for a Writ of Certiorari to the Fourth Circuit which is appended to this Brief.

INTEREST OF AMERICAN EXPORT LINES, INC., ET AL.

Amici curiae consist of twenty-three individual American steamship companies whose operations are nationwide, together with Pacific Merchant Shipping Association, a voluntary association of American steamship companies[1] whose major operations and headquarters are primarily on the West Coast of the United States. Certainly they are representative of both American and foreign steamship companies which do business in the United States in that they share a common exposure to personal injury claims by longshoremen and other harbor workers and are constantly engaged in such litigation in various federal district courts of the United States. Although precise statistics are not available for all of the vessel owners included as *amici curiae,* the seven members of Pacific Merchant Shipping Association alone had pending against them in September, 1978, a total of 862 lawsuits for injuries to longshoremen and harbor workers occurring since November 26, 1972, which were subject to 33 U.S.C.A. § 905(b) (1976 Supp.), the new subsection of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), *amending* 33 U.S.C. §§ 901 *et seq.* (1970), which became effective that date and which this Court is now asked to construe. The cases pending against all of the shipowners comprising *amici curiae* far exceed that substantial number.

[1] Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines (including American Mail Lines), Farrell Lines Incorporated, Matson Navigation Company, Prudential Lines, Inc., States Steamship Company and United States Lines, Inc.

Amici curiae believe *Edmonds*[2] was correctly decided as a matter of pure statutory construction, proper interpretation of the legislative history of the amended Longshoremen's Act and an equitable distribution of the financial risk when two parties are concurrently at fault for an injury-producing waterfront accident. However, *amici curiae's* large number of vessels operate in many jurisdictions where the issues presented here are unresolved. Additionally, because of the split of authority in different circuits, *amici curiae* are now subjected to differing rules of law in the ports in which their vessels call. Thus, for the many reasons ably expressed in the petition itself and in the dissenting opinion in *Edmonds, amici curiae* urge this Court to resolve those issues finally.

Amici curiae are vitally interested in having the Longshoremen's Act interpreted in a way that will result in achieving the broad purposes of the 1972 amendments by providing harbor workers with the ample benefits and long-term security which the Act provides; and by ensuring that litigation will be equitably determined in accordance with the overall aims of the amendments and current views on the equitable distribution of loss in maritime cases.

REASONS FOR GRANTING THE WRIT

Amici curiae concur with petitioner that *Edmonds* presents an important question of federal law which should be resolved by this Court in view of the sharply conflicting decisions between various federal courts.

I.

THERE IS A SHARP CONFLICT BETWEEN CIRCUITS.

Petitioner accurately states that there is a clear conflict between the Fourth Circuit's *Edmonds* decision

[2] Now officially reported, *Edmonds v. Compagnie Generale Transatlantique,* 577 F.2d 1153 (4th Cir. 1978).

on the one hand, and the decisions of the Ninth Circuit in *Shellman v. United States Lines,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1976) and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669 (9th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976) and of the Fifth Circuit in *Samuels v. Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir. 1978) on the other hand. The Fourth Circuit recognized that its decision created a conflict between circuits when Chief Judge Haynsworth, speaking for the majority, stated:

> We are aware, of course, that our decision today is in conflict with decisions in the Fifth and Ninth Circuits.

Petitioners' Appendix at A59, 577 F.2d at 1156 (citations omitted).

Petitioner is also correct in stating that in pure maritime litigation the Fourth Circuit stands alone in granting the vessel owner an "equitable credit" as it has now come to be known. The equitable credit, however, was initially termed "Murray credit" even in maritime cases because of its progenitor, *Murray v. United States,* 405 F.2d 1361 (D.C. Cir. 1968). In *Murray,* the District of Columbia Circuit held that an injured employee could recover only one-half of his proven damages from a negligent third-party, based on the theory that by accepting workmen's compensation from his concurrently negligent employer he had settled half of his claim. *Id.* at 1365-66.

While the Murray Credit has not been adopted outside the District of Columbia Circuit, it was later reaffirmed there in *Dawson v. Contractors Transport Corp.,* 467 F.2d 727 (D.C. Cir. 1972), whose significance is heightened by the fact that Dawson was covered by the Longshoremen's Act. In maritime cases, however, even those courts favoring the Equitable Credit rejected the Murray Credit since it divided damages equally

irrespective of the relative degrees of fault of the responsible parties. *See Shellman v. United States Lines Operators, Inc.,* 1975 A.M.C. 362, 368 (C.D. Cal. 1974); *Frasca v. Prudential-Grace Lines, Inc.,* 1975 A.M.C. 1130, 1144 (D. Md. 1975); *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk,* 398 F. Supp. 1224, 1232-33 (D. Ore. 1975). Significantly, those courts favoring the Equitable Credit rejected *Murray* for the identical reasons the Supreme Court, in *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975), overruled years of precedent awarding divided damages in collision cases because of their innate unfairness.

The conflict between circuits highlights the similarly conflicting and divided views of district courts and state courts in cases handed down since the enactment of the 1972 amendments to the Longshoremen's Act. For example, Judge Skopil of the District of Oregon, relying on this Court's decision in *Reliable Transfer,* stated in *Crowshaw v. Koninklijke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975):

> The 1972 amendments expressly authorize comparative negligence. Congress has left the mechanics of its application to the courts, as is customary.

Id. at 1233. But Judge Skopil, despite his own contrary conviction, felt bound to follow the views of Chief Judge Belloni in *Hubbard v. Great Pacific Shipping Co., Monrovia,* 404 F. Supp. 1242 (D. Ore. 1975), and denied a credit to the vessel owner whose fault for the injury-producing accident was less than that of the injured longshoreman's employer.

Indeed, Judge MacKenzie of the Eastern District of Virginia, from whose decision the *Edmonds* appeal was taken to the Fourth Circuit, expressly stated that he "*reluctantly*" denied granting the vessel owner a credit because he, as a district judge, felt that he should follow the higher authority of the Ninth Circuit in *Shellman*

and *Dodge*. Memorandum Order of Judge John A. MacKenzie, March 3, 1976, Petitioners' Appendix A15, A20.

There are numerous other examples of widely divergent views of experienced judges at all levels, the majority of which have been cited by Petitioner and need not be recited again herein, which demonstrate the clear need to have this Court resolve the uncertainty which now exists throughout all of the circuits faced with maritime personal injury litigation.

II.

PRIOR DECISIONS OF THIS COURT ARE IN APPARENT CONFLICT.

In a factual setting similar to the one presented herein, the Court held that a shipowner could not obtain contribution from a concurrently negligent stevedore. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). One year later, the Court held that a shipowner was not entitled to have its liability to an injured longshoreman reduced by the amount of compensation payments made by the longshoreman's concurrently negligent employer, since that would be the equivalent of contribution forbidden by *Halcyon*. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). Since the enactment of the 1972 amendments to the Longshoremen's Act, the Court has noted that the "factors underlying our decision in *Halcyon* still have much force." *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 112 (1974). These three landmark cases have been relied upon in every appellate decision to date questioning reduction of damages assessed against third parties when the injured worker's employer is concurrently negligent. *See Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 724-725 (2d Cir. 1978); *Landon v. Lief Hoegh and Co., Inc.*, 521 F.2d 756, 759-61 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Samuels v.*

Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 888 (5th Cir. 1978); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 670-73 (9th Cir. 1975); *Shellman v. United States Lines*, 528 F.2d 675, 678-80 (9th Cir. 1975).

Interestingly, Chief Judge Haynsworth's *en banc* opinion in this case failed to cite any of the three cases relied upon by other circuits. Instead, he relied upon this Court's opinion in *Reliable Transfer*, which advocated the allocation of "liability for damages according to comparative fault whenever possible." 421 U.S. at 411. While *Reliable Transfer* was decided two days before argument of the appeal in *Landon*, it was cited in neither that case nor in the subsequent appellate opinions in *Samuels*, *Shellman*, or *Dodge*. Judge Friendly cites *Reliable Transfer* in *Zapico*, 579 F.2d at 725, but only for a proposition totally unrelated to the apportionment of fault holding for which *Reliable Transfer* is best known.

The implications of *Halcyon*, *Hawn* and *Cooper Stevedoring* are clearly inconsistent with the apportionment of liability according to fault as approved in *Reliable Transfer*. Perhaps this explains the failure of any appellate court to date to analyze all of these opinions and suggest some accommodation of their conflicting legal tenets. Or perhaps the panels felt that one or more of the opinions was distinguishable. *Reliable Transfer*, for example, dealt only with property damage in collision cases, while in neither *Halcyon*, *Hawn* nor *Cooper Stevedoring* was the Court called upon to determine the validity of a credit defense such as that approved by the Fourth Circuit below in *Edmonds*.

Regardless of the distinguishing features of these Supreme Court cases, each provides some guidance by analogy. Where, as here, that guidance is inconsistent,

it is appropriate for this Court to step in and eliminate any discrepancies through a clear directive to the courts below. This is particularly true in this instance since "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime . . . ." *United States v. Reliable Transfer Co., Inc.*, 421 U.S. at 409.

CONCLUSION

The three parties concerned with the outcome of this litigation — the injured worker, the compensation carrier for the employer and the vessel — are in agreement that this Court should review the decision of the Fourth Circuit. *Amici curiae* respectfully submit their reasons are convincing: this important question of the interpretation of a newly amended federal statute should be reviewed and decided by this Court so that it will have uniform application in all maritime jurisdictions.

Respectfully submitted,

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WARREN B. DALY, JR.,
OBER, GRIMES & SHRIVER,
Of Counsel
October 9, 1978

EXHIBIT 1

In The Supreme Court Of The United States

October Term, 1978

No. 78—

Stanley D. Edmonds,
Petitioner,

v.

Compagnie General Transatlantique,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

CONSENT TO THE FILING OF BRIEFS AMICI CURIAE ON BEHALF OF AMERICAN EXPORT LINES, INC., ET AL.

We, the undersigned, counsel for the respective parties in the above-styled Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, hereby consent to the filing of a brief *amici curiae* on behalf of American Export Lines, Inc., et al. Should the Petition be granted by this Honorable Court, we further consent to the filing of a brief *amici curiae,* on the merits, on behalf of the same parties in

support of the Respondent, Compagnie General Transatlantique.

C. ARTHUR RUTTER, JR.,
Attorney for Stanley D. Edmonds, Petitioner

Dated: Sept. 8, 1978

CHARLES F. TUCKER,
Attorney for Compagnie Generale Transatlantique, Respondent

Dated: September 11, 1978

Supreme Court, U. S.
FILED
DEC 29 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

RECORD NO. 78-479

STANLEY D. EDMONDS,
Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE,
Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Fourth Circuit

PETITION FOR CERTIORARI FILED
SEPTEMBER 11, 1978

CERTIORARI GRANTED NOVEMBER 6, 1978

A P P E N D I X

APPENDIX INDEX

Page

Excerpts from Judge MacKenzie's Charge to the Jury on December 17, 1975 . . . . . A1

Jury Verdict of December 17, 1975. . . . . A9

[The Lower Court Opinions are attached to the Petition for Certiorari]

EXCERPTS FROM JUDGE MAC KENZIE'S CHARGE TO THE JURY on December 17, 1975.

Page 9, Line 10 through page 17, of Trial Transcript.

Now the shipowner is liable for the negligence which proximately contributed to the plaintiff's injury, although the plaintiff's fellow employees may also be concurrently negligent. If th shipowner defendant knew of a condition dangerous to longshoremen, and such condition was not known to the plaintiff, or to his fellow employees, or readily apparent to one exercising ordinary care, then the shipowner owes the longshoremen the duty to use reasonable care to notify the longshoremen and the stevedoring company of such condition in order to prevent injury. But the defendant shipowner was under no duty to warn the plaintiff of a defect or danger which was known to the plaintiff, or which was as well known to him as to

the defendant, or which was obvious, or would have been observed by him in the exercise of ordinary care.

The defendant shipowner has the duty to exercise ordinary care to place the ship and equipment in such condition that an experienced stevedore would be able, through the exercise of ordinary care, to discharge the cargo in a workmanlike manner and with reasonable safety to persons and property.

The defendant, French Lines, is not responsible for any condition or conditions created by the manner or method in which the stevedore Nacirema Company, Incorporated, or its employees, including the plaintiff, selected to perform that work. Therefore, if you believe from the evidence that the plaintiff's accident was caused by the manner in which the plaintiff and his fellow employees performed their duties

in discharging the trailer, and if this was the sole proximate cause of the accident, rather than any negligence of the shipowner, then in such an event there would be no liability to be imposed upon the shipowner and you would find your verdict for the defendant.

The plaintiff's employee, Nacirema Operating Company, Inc., was an independent contractor hired as an expert to discharge the defendant's vessel. The defendant, French Lines, is not responsible for the negligent acts of the independent contractor's employees. And, therefore, if you find from a preponderance of the evidence that the accident sustained by the plaintiff came about as a result of the negligent act of the employees of the stevedore, Nacirema Operating Company, and not as a result of any negligence on the part of the shipowner, then the plaintiff can not

recover and you should find your verdict for the defendant.

If you conclude that the accident sustained by the plaintiff was as a result of the manner in which the plaintiff and his fellow workers performed their duties in discharging the trailer, and that this was the sole proximate cause of the accident, rather than any negligence of the French Lines shipowner, then in such event there would be no liability to be imposed upon the French Lines and you would return your verdict in favor of the defendant. The plaintiff, Stanley Edmonds, was himself required by law to use ordinary and reasonable care to look out for his own safety. As an experienced worker he had the duty and responsibility to use due care with regard to existing conditions, so as to avoid injury to himself and to others if he could reasonably do

so. If he failed to use such ordinary and reasonable care, and if such failure was the sole, only proximate cause of his accident and injuries, then, of course, there would be no recovery and your verdict would be for the defendant.

The plaintiff, however, Stanley Edmonds, does not assume the risk of employment in the performance of his services aboard the vessel. If you find that the defendant shipowner was negligent, and if you thereafter find that such negligence was in fact a proximate cause of the accident and of the injuries complained of, you must then further determine whether or not the plaintiff Edmonds was himself guilty of any negligence whatsoever which was also a contributing proximate cause of the accident.

And you will find on the form, an extraordinary form verdict which I will

send with you and will explain to you in a minute that that is a matter which may be connoted thereon.

Under the terms of this special verdict form, if you find that any contributory negligence has been shown you must state it in terms of a percentage, and I will talk to you about that.

Unlike other cases that you may have had, ladies and gentlemen, you are going to -- I am going to submit this case to you on what is called special interrogatories to the jury. It says: "Issues to the Jury," and there are contained seven questions. The questions, I think, are self explanatory, but I will run over one or two of them so you will see how your deliberations would go.

Question number one reads:

"1. Did any negligence of the shipowner, Compagnie Generale Transatlantique

cause or contribute to the plaintiff's injuries."

And you are to record your answer, yes or no. If the answer to that first question was no, then you would need not answer any of the other questions on the form because under those circumstances French Lines would not be responsible.

But if you answered that there was negligence on the French Lines, and the answer was yes, you would go to the second question which reads:

"2. If the answer to the first issue is yes, to what extent, expressed percentagewise, was the vessel owner negligent."

Bearing in mind that the total negligence would be 100 percent, and that in answering the questions that then arise they would total 100 percent when you got through.

The third question is:

"3. Did any negligence of the stevedore, Nacirema Operating Company, Inc., cause or contribute to the plaintiff's injuries."

Your answer would be yes or no. If the answer to that question was yes, you would have to express to what extent, expressed percentagewise, was the stevedoring company negligent.

"Did any negligence of the plaintiff, Stanley Edmonds, cause or contribute to his own injuries."

You would answer that, yes or no. That is a contributory negligence question.

The next one is, "If the answer to the fifth issue is yes, to what extent, expressed percentagewise, the plaintiff was negligent."

And the final question is:

"7. At what sum do you assess plaintiff's monetary damages attributable

to his accident onboard the SS ATLANTIC COGNAC? This figure should be arrived at irrespective of your findings of negligence, if any, on the part of the stevedoring company, the vessel owner, or the plaintiff himself."

In other words, the answer to number seven is a gross figure to which at the proper time, under the law, I would apply the percentage as you have found them, if any you find.

Page 25, Line 1 through Page 27, Line 17, of Trial Transcript.

(The jury returned to the court-room at 11:07 a.m.)

THE CLERK: Members of the Jury, have you agreed upon a verdict?

FOREMAN DUKE: Yes.

THE CLERK: May we have it,please?

In the matter of Stanley Edmonds versus the French Lines, Civil Action 74-339-N, Issues to the Jury.

Did any negligence of the shipowner, Compagnie Generale Transatlantique, cause or contribute to the plaintiff's injuries?

Answer, yes.

If the answer to this first issue is yes, to what extent, expressed percentagewise, was the vessel owner negligent?

Answer, 20 percent.

3. Did any negligence of the stevedore, Nacirema Operating Company, Inc., cause or contribute to the plaintiff's injuries?

Answer, yes.

If the answer to the third issue is yes, to what extent, expressed percentagewise, was the stevedoring company negligent.

Answer, 70 percent.

5. Did any negligence of the plaintiff, Stanley D. Edmonds, cause or contribute to his own injuries.

Answer, yes.

6. If the answer to the fifth issue is yes, to what extent, expressed percentagewise, was the plaintiff negligent.

Answer, 10 percent.

7. At what sum do you assess plaintiff's monetary damages attributable to his accident on board the SS ATLANTIC COGNAC? This figure should be arrived at irrespective of your findings of negligence, if any, on the part of the stevedoring company, the vessel owner, or the plaintiff himself.

Answer, $100,00.

Signed William T. Duke, Foreman.

Supreme Court, U. S.
FILED
OCT 11 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-479

STANLEY D. EDMONDS,

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v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Reasons For Granting The Writ	2
A. Conflict Among The Circuits	2
B. Conflict With Prior Decisions Of This Court	4
Conclusion	4

TABLE OF CASES

Dawson v. *Contractors Transport Corp.*, 467 F. (2d) 727 (D.C. Cir. 1972)	3
Halcyon Lines v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952)	4
Marant v. *Farrell Lines, Inc.*, 550 F. (2d) 142 (3rd Cir. 1977)	3
Murray v. *United States*, 405 F. (2d) 1361 (D.C. Cir. 1968)	2
Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406 (1953)	4
Samuels v. *Empresa Lineas Maritimas Argentinas*, 573 F. (2d) 884 (5th Cir. 1978)	2
Shellman v. *U. S. Lines, Inc.*, 528 F. (2d) 675 (9th Cir. 1975), cert. denied, 425 U. S. 936 (1976)	2
United States v. *Reliable Transfer Co., Inc.*, 421 U. S. 397 (1975)	3

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RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

I.

Respondent shipowner believes that the opinion of the United States Court of Appeals for the Fourth Circuit rendered on June 22, 1978 was correct and is based on a proper interpretation of the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., and prior decisions of this Court. However, since the issues involved in this case are of considerable importance to the maritime industry, respondent feels that the Petition for a Writ of Certiorari should be granted so as to

permit a definitive ruling by this Court with regard to the important issues raised in this case, thus establishing a uniform rule to be applied in similar cases throughout the country.

II.

REASONS FOR GRANTING THE WRIT

A. Conflict Among The Circuits.

Respondent agrees with Petitioner that there is a clear conflict among the Circuits on the question of whether a shipowner is only responsible for that portion of the total damages attributable to its fault or whether it must pay the total amount of the damages, even that part caused by negligence of an injured longshoreman's stevedore employer. The Fourth Circuit has held, respondent feels correctly, that fault must be apportioned and that a shipowner is only responsible for that portion of the damages caused by its negligence, while the Ninth and Fifth Circuits have refused to apportion fault between shipowner and employer. *Shellman* v. *U. S. Lines, Inc.*, 528 F (2d) 675 (9th Cir. 1975), cert. denied, 425 U. S. 936 (1976); *Samuels* v. *Empresa Lineas Maritimas Argentinas*, 573 F (2d) 884 (5th Cir. 1978).

While respondent recognizes this conflict among the Circuits, it should be pointed out that the decision of the Fourth Circuit in *Edmonds* is not the first time such an apportionment has been granted. In a non-maritime case, the District of Columbia Circuit held in 1968 that an injured employee's damages would be reduced by one-half because his workman's compensation paying employer was concurrently negligent. *Murray* v. *United States*, 405 F (2d) 1361 (D.C. Cir. 1968). While *Murray* involved an interpretation of the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101 et seq., this ruling was later extended in *Dawson* v. *Contractors Transport Corp.*, 467 F (2d) 727 (D.C. Cir. 1972), to an action in which the plaintiff was covered by the Longshoremen's and Harbor Workers' Compensation Act.[1]

In addition, the Third Circuit, in the case of *Marant* v. *Farrell Lines, Inc.*, 550 F (2d) 142 (3rd Cir. 1977), reviewed the cases that had to that time dealt with the "equitable credit" theory, including *Murray* and *Dawson*, discussed the various cases in some detail and concluded that in light of the Supreme Court's attitude in maritime matters as demonstrated in *United States* v. *Reliable Transfer Co., Inc.*, 421 U. S. 397 (1975), the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence was very much an open question. The majority opinion in *Marant* seems to indicate that the Third Circuit, if faced squarely with the question, would follow the lead of the Fourth Circuit in the present case and hold a shipowner responsible only for that portion of the damages caused by the shipowner's fault.

Thus, it is obvious that under the present state of the law, an injured longshoreman's remedy, and the shipowner's potential liability, will be governed according to the port in which the accident occurred and not uniformly throughout the country. Respondent conducts operations in various ports of the East Coast of the United States and its operations will be subject to varying rules if this Court does not grant Certiorari to resolve the conflict among the Courts. We submit that this Court should resolve the conflict by adopting the view of the Fourth Circuit.

---

[1] Since 1928, the Longshoremen's and Harbor Workers' Compensation Act has been utilized as the compensation law for all non-governmental employees working in the District of Columbia.

B. Conflict With Prior Decisions Of This Court.

The Fourth Circuit, in its en banc decision, cited *Reliable Transfer* as its authority for apportioning fault between the shipowner and a concurrently negligent stevedore and contrary to petitioner's view we feel that such a holding is not in direct conflict with this Court's earlier decisions in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952) and *Pope & Talbot Inc.* v. *Hawn*, 346 U.S. 406 (1953). However, we recognize that several courts, including the Ninth Circuit in *Shellman*, feel that *Halcyon* and *Hawn* preclude the adoption of a system of proportionate fault in a situation where shipowner and stevedore—employer are concurrently at fault. This Court should therefore grant Certiorari to resolve this apparent conflict and provide clear direction to the lower courts as to the continued viability of *Halcyon* and *Hawn*.

III.

CONCLUSION

Although respondent strongly believes that the Fourth Circuit was correct in ruling that a shipowner's liability to an injured longshoreman is limited to its percentage of fault, it nevertheless submits that this case involves an important question of Federal law which should be reviewed and decided by this Court and made uniform throughout all jurisdictions.

Respectfully Submitted,

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I N D E X

Subject Index

	Page
Opinions Delivered in the Courts Below	1
Jurisdiction	3
Statutory Provisions	4
Question Presented	6
Statement of the Case	6
Summary of Argument	8
Argument	11
Conclusion	49

CITATIONS

Cases

Page

Albert v. Paulo, 552 F2d 1139 (1977) 25

Atlantic Coast Line R.R. v. Erie Lackawanna R. Co. 406 U.S. 340 (1972) 39

Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974) 39

Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975) cert. denied, 425 U.S. 944 (1976) 26

Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) 40

Griffith v. Wheeling Pittsburgh Steel Co., 521 F2d 31 (3d Cir. 1975) 32

Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 342 U.S. 382 (1952) 14

Howard v. Romen, 442 F. Supp. 1142 (S.D. Ala. 1977) . . . 25

Hubbard v. Great Pacific Shipping Co., Monrovia, 404 F. Supp. 1242 (D. ore. 1975) 26

Cases Continued: Page

Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) 24

Jackson v. Lykes Brothers Steamship Co., 386 U.S. 371 (1967) 30

Landon v. Lief Hoegh & Co., Inc., 521 F. 2d 756, 763 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976) 25-33

Lucas v. "Brinknes" Schiffahrts ges., 379 F. Supp. 759 (E. D. Pa. 1974) 26

Marant v. Farrell Lines, 550 F. 2d 142 (3d Cir. 1977) 19

Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) 23

Pope and Talbot, Inc., v. Hawn, 346 U.S. 406 (1953) 14

Reed v. S. S. Yaka, 373 U.S. 410 (1963) 30

Ryan Stevedoring Co., v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956) 15

Samuels v. Empresa Lineas Maritimes Argentinas 573 F. 2d 884 (1978) 25

Santino v. Liberian Distance Transports., Inc., 405 F. Supp. 34 (W.D. Wash. 1975) 41

Cases Continued: Page

Seas Shipping Co. v. Sieracki, 328 U. S. 25 (1946) 11,17

Shellman v. United States Lines, Inc., 528 F. 2d 675 (9th Cir. 1975),. cert. denied, 425 U. S. 936 (1976) 26,42

Shepler v. Weyerhaeuser Co., 569 P. 2d 1040 (Ore. 1977) 26

Solsvik v. Maremar Compania Naviera, S. A., 399 F. Supp. 712 (W.D. Wash. 1975) 48

United States v. Reliable Transfer Co., 421 U. S. 397 (1975) . 35

Voris v. Eikel, 346 U. S. 328 (1953) 23

Zapico v. Bucyrus-Erie Co., 579 F. 2d 714 (2d Cir. 1977) . 25

Statutes

33 U.S.C. Section:
902 (4) 29-30

905 4

Other

74 Am Jur 2d, Torts:

Section 61 12

Section 69 13

Continued: Page

Section 71 12

Prosser, The Handbook of the Law of Torts, Section 47, (4th ed. 1971) 12

Restatement of Judgments . . . 25

Restatement of Torts, Section 880 13

S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 17

IN THE SUPREME COURT
OF THE
UNITED STATES

No. 78-479

STANLEY D. EDMONDS, Petitioner,

v.

COMPAGNIE GENERALE
TRANSATLANTIQUE, Respondent.

BRIEF FOR THE PETITIONER

OPINIONS DELIVERED IN THE COURTS BELOW:

Petitioner, a longshoreman, received benefits under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. for injuries received aboard defendant's vessel. Additionally he brought the instant suit against the defendant vessel owner for negligence. That suit was tried with a jury in the United

States District Court for the Eastern Distict of Virginia, Norfolk Division, before the Honorable Richard B. Kellam, District Judge on March 6th, 7th and 10th, 1975. A verdict in the amount of $97,500.00 was rendered against the vessel owner (by Order dated September 3, 1975). The Court set aside the verdict and ordered a new trial.

On December 16, 1975, a new trial with a jury was had before the Honorable John A. McKenzie, District Judge, and a verdict was returned against the vessel owner in the amount of $100,000.00. The amount of the verdict was reduced to $90,000.00 on the finding of 10% contributory fault of the plaintiff, and judgment was entered in that amount by Order dated March 3, 1976. The matter was appealed by defendant in the District Court to the Court of Appeals for the Fourth Circuit. A panel of the Fourth

Circuit in an Opinion dated May 6, 1977 limited the vessel owner's liability to "the extent of its fault, in this case $20,000.00." 558 F2d at 189; App. at p. 26. Rehearing en banc was granted on June 3, 1977. The en banc decision of the Fourth Circuit, decided June 22, 1978, reversed the District Court's entry of judgment in the amount of $90,000.00 and remanded the case for entry of judgment against the shipowner for $20,000.00 and for further deliberation on the distribution of $20,000.00 between the longshoreman and the stevedore. All pertinent opinions are included in the Appendix to the Petition for Certiorari.

JURISDICTION

The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari

is 28 U.S.C. Section 1254 (1).

The date of the Judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is June 22, 1978. That decision was the result of the Fourth Circuit's en banc rehearing of the decision rendered May 6, 1977, by a panel of that court. No rehearing of the June 22, 1978 decision has been requested and no extension of time has been requested.

STATUTORY PROVISIONS

33 U.S.C. Section 905:

> Sec. 5.(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as

required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing

> stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

QUESTION PRESENTED

1. Does 33 U.S.C. Section 905(b), as amended in 1972, permit a reduction in a vessel owner's liability to an injured longshoreman where the vessel owner's negligence is joined by concurring negligence on the part of the longshoreman and his stevedore employer?

STATEMENT OF THE CASE

Stanley Edmonds was employed by Nacirema Operating Company, a stevedoring company, as a longshoreman to assist in the unloading of the vessel

SS ATLANTIC COGNAC, owned by the defendant Compagnie Generale Transatlantique, while the vessel was docked at Portsmouth Marine Terminals, Portsmouth, Virginia, on March 3, 1974. While performing his duties Edmonds sustained serious and permanent injuries when a container which he was behind rolled back, crushing him against the bulkhead of the vessel. A mate employed by the vessel had ordered Edmonds behind the container to remove a jack which had been placed there for stability during the voyage from Europe. A "hustler" operated by a fellow longshoreman, in clear view of the mate, had at approximately the same time circled in the hold of the vessel and backed into the container causing it to roll back on Edmonds. The air brakes on the container were inoperable because a pet cock had been left open apparently when the container was loaded

on the vessel in Rotterdam. Jurisdiction in the court of first instance, the United States District Court for the Eastern District of Virginia existed by virtue of Title 28, U.S.C.A. 1332 on the grounds of diversity of citizenship and the amount in controversy.

SUMMARY OF ARGUMENT

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, a longshoreman could sue a third party vessel owner for negligence or unseaworthiness. The general common law doctrine of joint and several liability was applied in such cases, with the result that the longshoreman recovered his full damages from the jointly and severally liable vessel owner. The fact that a stevedore-employer may have been concurrently negligent did not serve to reduce the

amount a longshoreman could recover from the vessel owner.

In 1972, Congress, after long bargaining and negotiating, enacted substantial revisions to the Longshoremen's Act. The Amendments removed seaworthiness as a basis for vessel owner liability, but left intact the longshoreman's claim for negligence. Since the law previously permitted the longshoreman to recover his full damages from the vessel, and Congress did nothing to change that, full recovery by the longshoreman of his proven damages is still proper.

There is nothing in the statute itself or in the legislative history which abrogates the rule of joint and several liability. There is nothing in the statute which approves the concept of reducing the longshoreman's recovery where the stevedore employer is concurrently

negligent. The purported inconsistency in Section 905(b) of the Act alluded to by the Fourth Circuit does not exist. That section merely creates in longshoremen employed directly by the ship the same right to sue the vessel owner for negligence as is enjoyed by longshoremen employed by stevedoring companies.

The Court is dealing here with a carefully constructed Congressional scheme which balanced various competing interests. The Court should not disrupt that delicate balance by creating a new remedy for the vessel owner. If any change in the Longshoremen's Act is necessary, that change should be made by the Congress.

ARGUMENT

Prior to the 1972 Amendments to the Longshoremen and Harbor Workers' Compensation Act, it was clear that the longshoreman could sue a third party vessel owner. And the longshoreman's recovery could be grounded upon either or both of two bases--unseaworthiness or negligence. Under this Court's decision in Seas Shipping Company v. Sieracki, 328 U.S. 25 (1946), a warranty of seaworthiness ran to a longshoreman from a vessel owner. The vessel owner would be liable to the longshoreman for damages resulting from a breach of that warranty of seaworthiness. There was also a cause of action against the vessel owner for negligence at common law, which was specifically recognized in the Longshoremen's Act, even in the pre-1972 days. If the longshoreman successfully

proved unseaworthiness or negligence by the vessel owner, the plaintiff longshoreman recovered his full damages from that third party defendant.

The common law permitted a plaintiff to recover his full damages from any joint tort feasor. The general common law rule is that joint tort feasors are jointly and severally liable for the whole of any damages caused. Hence, a tort jointly committed by several tort feasors may be treated as joint or several at the election of the agrieved party. 74 Am Jur. 2d, Torts Section 61. Thus one who was injured by the wrongful act of two or more joint tort feasors had the option to sue each such tort feasor separately, or to join any number less than the whole, or to join them all as parties defendant in the single action. Id., Section 71. Prosser, The Handbook of the Law of Torts, Section 47,

(4th Edition 1971). Moreover, the fact that one joint tort feasor is protected from liability does not relieve the other non-protected joint tort feasor from liability to the person who has been harmed. 74 Am Jur. 2d, Torts, Section 69. The Restatement of Torts, Section 880 provides, "Where two persons would otherwise be liable for a harm, one of them is not relieved from liability by the fact that the other has an absolute privilege to act or an immunity from liability to the persons harmed."

The courts applied these common law principles to the third party suit available to an injured longshoreman. The courts recognized that a longshoreman could not bring suit against his employer because the employer was protected from suit by the provisions of the Longshoremen's Act. However, where a third party had caused injury to a longshoreman,

even if the stevedore employer had been concurrently negligent, the courts permitted full recovery by the longshoreman of all his proven damages. The courts followed the general principles of joint and several liability as known at common law.

This Court in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, 342 U.S. 382 (1952), refused to permit a third party vessel owner to recover from the employer a percentage of the damages the vessel was required to pay to a longshoreman, where the employer had been concurrently negligent. The court noted that it was the rule at common law that in the absence of legislation to the contrary, there was no right of contribution between joint tort feasors. This court later extended that rule further in the case of Pope and Talbot Inc. v. Hawn, 346 U.S. 406

(1953). This court refused to permit a reduction in the vessel's liability by the amount of compensation payments made to the longshoreman by the stevedore employer, where the stevedore has been concurrently negligent. The court characterized any such reduction in the vessel's favor as the substantial equivalent of contribution, which the court had declined to require in Halcyon.

This court did not leave the vessel owner without recourse, however. In Ryan Stevedoring Company v. Pan Atlantic Steamship Corporation, 350 U.S. 124 (1956), the court permitted the vessel owner to recover over against the stevedore employer for damages it had to pay the longshoreman, based upon a breach of the stevedore's implied warranty of workmanlike performance. Thus, the situation existing prior to the 1972 Amendments was this: A longshoreman

could receive from his employer the relatively low compensation benefits provided under the Act and could bring a suit against the third party vessel owner grounded in either unseaworthiness or negligence. The vessel owner could in turn claim against the stevedore employer for breach of the implied warranty of workmanlike performance. In short, the ultimate liability for injuries to the longshoreman rested upon the stevedore employer, both in the form of compensation payments and in damages. But the longshoreman, in his third party action, recovered his full proven damages. The law did not reduce the longshoreman's damages on account of concurrent stevedore negligence. The courts followed the general common law rule of joint and several liability.

However, in 1972 Congress undertook a major revision of the Longshoremen's

Act. It is therefore appropriate to consider precisely what Congress had in mind when enacting the 1972 Amendments. There were certain specific concerns which Congress addressed in 1972. Congress was clearly concerned that the level of workmen's compensation benefits payable under the Act was far too low. Yet Congress recognized that employer's were not eager to increase those benefits while the employers bore the ultimate cost of the litigation which ensued under Sieracki and Ryan. Congress recognized the financial burden this created for employers. Congress was specifically concerned that these three party law suits expended stevedore resources and crowded court dockets, yet resulted in little actual benefits to injured workers. Senate Report No. 92-1125, 92d Cong. 2d Sess. 4, 9.

At the same time, Congress recognized

that longshoring was a high risk occupation, with an injury frequency rate far above the average for manufacturing operations. Id. at 2. The Congress clearly desired to reduce that excessive injury rate. As the Senate Report stated,

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land based person in providing a safe place to work. Thus, nothing in this bill is intended to deregate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Id. at 10.

In enacting the 1972 Amendments Congress received input from representatives of employers, from stevedore employers, and from shipowners and other third parties. The legislation that resulted was a careful compromise between these competing interests. As

Judge Van Dusen accurately noted in his concurring opinion in Marant v. Farrell Lines, 550 F2d 142 (3d Cir. 1977),

> "It is clear that Congress gave careful thought to the statutory scheme of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and the changes in that scheme brought about by the enactment P.L. 92-576 in 1972. Both Houses of Congress held extensive hearings on proposed bills incorporating different changes, see Hearings on S. 2318, S. 525, S. 1547 Before the Sub. Comm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972), Hearings on H.R. 247 H.R. 3505 H.R. 12006, H.R. 15023 before the Sub. Comm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972), and both Houses wrote extensive committee reports to explain the purpose underlying P.L. 92-576, see S.Rep. No. 1125, 92d Cong. 2d Sess. (1972), H. Rep. No. 1441, 92d Cong. 2d Sess. (1972). See also comment, Negligence Standards under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Examining the Viewpoints, 21 Vill L.Rev. 244 (1975-1976)."

Id. at 147-48, n.1.

The Senate Report to the 1972 Amendments demonstrates this Congressional intention to create a comprehensive scheme for covered employees to provide adequate financial benefits, preserve employers' resources to fund those benefits, and encourage safety in the industry. As the Senate Report summarized,

> "The Bill reported by the Committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and by outlawing indemnification actions and 'hold harmless' or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time, it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support would be payments under the Act." S. Rep. at 5.

In other words, Congress exacted a quid pro quo from each of the parties.

Longshoremen gave up the right to recover for unseaworthiness, proof of which was relatively easy under applicable case law. The longshoreman retained the right to sue the vessel for negligence under Section 905(b). In return, Congress protected the longshoreman with greatly increased compensation benefits from the employer.

The shipowner gave up the right to recover over from the stevedore under theories of indemnity or warranty for damages awarded to a longshoreman. In return, Congress protected the shipowner from suit by the longshoreman based upon unseaworthiness. The vessel could be held liable to the longshoreman only for negligence.

The stevedore gave up the low compensation benefits structure and was required to make weekly payments to longshoremen more in keeping with actual

earnings of injured workers. In return, Congress protected the stevedore from any recovery over by the vessel owner under indemnity, warranty, or any other theory. This carefully constructed scheme provided additional benefits for each interested party and created additional protections for each party. As is usually the case in a political compromise, each side gained something and each side gave up something. The interest of each had been balanced in the legislative process.

However, aside from the changes undertaken by the 1972 Amendments, Congress left the other statutory provisions and court interpretations intact. In short, if Congress did not change the previously followed rule of joint and several liability, then we can presume Congress intended that that rule continue in force and effect. Thus, the

question for this Court to decide is, what did Congress intend with regard to the longshoreman's third party suit. Did Congress intend to reduce a vessel owner's liability to an injured longshoreman where the vessel owner's negligence is joined by concurrent negligence of the stevedore employer?

In determining what Congress intended regarding the longshoreman's third party suit, this Court must bear in mind the remedial purpose of the Longshoremen's Act. The Act is to be "liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977)

Moreover, it is a rule of statutory construction that statutes in

derogation of the common law are to be strictly construed. As this Court said in Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952),

> "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

In Isbrandtsen, the Court went on to add that "maritime legislation. . . should be construed to make effective its design to change the general maritime law so as to improve the lot of seamen." Id. Similarly, in construing the 1972 Amendments, any construction which alters the common law to the disadvantage of longshoremen should not be favored.

Petitioner submits that the Longshoremen's Act permits the injured longshoreman to recover his full damages where he is injured due to the negligence of the

vessel, according to common law principles of joint and severable liability. Petitioner submits that any attempt to reduce the injured longshoreman's damages because the stevedore employer may also have been at fault is contrary to the Longshoremen's Act, contrary to the intent of Congress, contrary this Court's prior decisions, contrary to the common law, contrary to the Restatement of Judgments, and contrary to the decisions of the Second, Fifth and Ninth Circuits. In the Second Circuit, see Landon v. Lief Hoegh and Co., Inc., 521 F2d 756 (1975), cert. denied, 423 U.S. 1053 (1976); Zapico v. Bucyrus Co., 579 F2d 714 (1978). In the Fifth Circuit, see Samuels v. Empresa Lineas Maritimas Argentinas, 573 F2d 884 (1978); Howard v. Romen, 442 F.Supp. 1142 (S.D. Ala. 1977). See also Albert v. Paulo, 552 F2d 1139 (1977). In the Ninth Circuit,

see Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975), cert. denied, 425 U.S. 944 (1976); Shellman v. United States Lines, Inc., 528 F2d 675 (1975), cert. denied, 425 U.S. 936 (1976); Hubbard v. Great Pacific Shipping Co., Monrovia, 404 F.Supp. 1242 (D. Ore. 1975). See also Lucas v. "Brinknes" Schiffahrts Ges., 379 F.Supp. 759 (E.D. Pa. 1974); Shepler v. Weyerhaeuser Co., 569 P2d 1040 (Ore. 1977).

Despite the contrary authority, petitioner here was held to be entitled to recover only $20,000 of his $100,000 jury verdict against the third party vessel owner. That jury verdict was reduced by the degree of contributory fault of the longshoreman himself (here 10%), resulting in a final verdict of $90,000. However, in the Fourth Circuit Opinion here under review, because the vessel was 20% at fault and the stevedore

70% at fault, the shipowner was held to be liable only for 20% of the amount of damages found by the jury. The Fourth Circuit, though recognizing that its opinion conflicted with the decisions of other circuit courts, nevertheless concluded that the longshoreman could recover only that percentage of his damages which matches the ship's percentage of negligence.

The Fourth Circuit based its conclusion largely on a purported internal conflict in the language of Section 905(b). The first sentence of that Section says that if the longshoreman's injuries are caused by the negligence of the vessel then the longshoreman may recover.

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or any one otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the

provisions of Section 33
of this Act. . .."

The second sentence of Sub-Section 905(b) says that if the vessel itself employed the longshoreman, he may not recover if the injury was caused by the negligence of persons providing stevedoring services. "If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

The Fourth Circuit construes this language to mean that if there is negligence by those persons providing stevedoring services (longshoremen), a vessel-employed longshoreman may not recover. From this the Fourth Circuit then concludes that Congress intended to provide for liability on the ship-

owner only to the extent its fault contributed to the injury, while insulating the vessel from liability to the extent the stevedore's fault contributed to the accident.

Petitioner submits that there is absolutely no internal inconsistency in Section 905(b). The language of the second sentence in Section 905(b) is merely designed to cover the unusual situation where the vessel owner employs the longshoreman directly. Normally, longshoremen are employed by a stevedoring company, which in turn contracts to perform longshoring work for a vessel owner. Where the vessel owner employs the longshoreman directly, the vessel owner is then an employer under the Act. For, as Section 2(4) of the Act provides,

> "The term 'employer' means an employer any of whose employees are employed in whole or in part upon the navigable waters of the United

> States (including any adjoining pier, wharf, dry dock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building of vessel)".

A vessel owner who employs longshoremen directly would then be liable for compensation payments under the Act. The exclusive remedy provision of Section 5 of the Act protects an employer from suit by an employee for on the job injuries. But it was not the intent of Congress to insulate a vessel owner from suit by longshoremen injured aboard his vessel. Therefore, in the unusual case where the vessel directly employs the longshoreman, this Court has permitted suit against that vessel owner as a vessel owner. Reed v. SS YAKA, 373 U.S. 410 (1963); Jackson v. Lykes Bros. Steamship Co., 386 U.S. 371 (1967). However, the second sentence of Section 905(b)

provides that such a vessel-employed longshoreman may not base his claim for damages against the ship on the negligence of others engaged in providing stevedoring services to the vessel. As Judge Hall points out in his Edmonds dissent, "The second sentence is not in conflict with the first, but simply says that the plaintiff may not base his claim against the shipowner upon the negligence of the stevedore." App. to Pet. for Cert. A64-A65. This is clearly the intention of Congress. Congress meant to provide to all longshoremen the same third party negligence suit against vessel owners, whether the longshoreman was employed by a stevedore company or by the vessel directly. The second sentence of Section 905(b) is only meant to provide for that equality. The Senate Report makes that abundantly clear when it says:

> "Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to shipbuilding or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoreman or shipbuilders or repairmen as apply when an independent contractor employs such persons." S. Rep. at 11-12.

This Congressional intent was followed by the Third Circuit in Griffith v. Wheeling Pittsburgh Steel Company, 521 F2d 31 (3d Cir. 1975). The Court there concluded,

> "The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence." Id. at 43.

The result intended by Congress

is clear. Where a shipowner employs its own longshoremen, that shipowner functions as an employer under the Act. As such, that shipowner is liable for compensation payments under that Act. Yet, the longshoreman employed directly by that shipowner retains his right against the shipowner to sue for negligence of the vessel. What Congress did in the second sentence of Section 905(b) was insure that that longshoreman could recover only for the negligence of the shipowner as a shipowner. Negligence of the shipowner as a stevedore would not be a ground for recovery. The same result obtains where a shipowner employs a stevedoring company; if the accident was caused by the stevedore, the vessel would be neither negligent nor liable. Landon v. Lief Hoegh & Co., Inc., 521 F2d at 763.

Part of the difficulty in

interpreting Section 905(b) is caused by the fact that Congress phrased the second sentence of that section in the negative rather than in the positive. If Congress had simply phrased the second and third sentences of Section 905(b) in the affirmative, as it did the first sentence, the lack of inconsistency would be manifest. If stated affirmatively, the second sentence of Section 905(b) would read:

> "If such persons was employed by the vessel to provide stevedoring services, then an action shall be permitted if the injury was caused by the negligence of persons not engaged in providing stevedoring services to the vessel."

It is surely no different where Congress has said instead, as the second sentence of Section 905(b) actually reads:

> "If such persons was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by

> the negligence of persons engaged in providing stevedoring services to the vessel."

Thus, the Fourth Circuit's effort to support a theory of reducing a longshoreman's damages on account of stevedore negligence cannot find support in the language of Section 905(b).

The Fourth Circuit also supported its conclusion by reference to this Court's opinion in United States v. Reliable Transfer Company, 421 U.S. 397 (1975). The Fourth Circuit relied on a "trend" towards expansion of the doctrine of comparative negligence, as evidenced by the application of comparative negligence in Reliable Transfer. Apparently the Fourth Circuit believed it was applying comparative negligence by reducing the longshoreman's recovery by the amount of concurrent stevedore negligence. Such an interpretation

finds no support in the legislative history of the Act. The only mention of comparative negligence in the legislative history is the statement that, "The Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to cause him the injury." S. Rep. at 12. That language clearly applies comparative negligence only to the question of the plaintiff longshoreman's own fault. Nowhere does the legislative history suggest that the negligence of the stevedore be applied in some fashion to reduce the longshoreman's recovery.

The Fourth Circuit's reliance on Reliable Transfer is a misplaced effort to view the issue in this case solely as a question of admiralty law. This Court

recognized in Reliable Transfer that in maritime law the judiciary has traditionally taken the lead in formulating flexible and fair remedies. 421 U.S. at 409. The vessel owner in the instant matter, and the Fourth Circuit in its opinion, urge as well that it is appropriate for the judiciary to fashion a remedy dealing with longshoremen's third party negligence suits, which reduces the vessel owner's liability to the longshoreman by the amount of concurrent stevedore negligence. The Court in Reliable Transfer recognized that no statutory or judicial precept precluded a change in the rule of divided damages. Id. In the instant matter, however, there is a very carefully constructed statutory scheme, the result of long hours of bargaining and compromise in the Congress. The language in the legislative history leads to the

conclusion that Congress did not intend to reduce the longshoreman's damages where the stevedore was concurrently negligent. Rather, the statute envisions full recovery by a longshoreman for all damages caused by the vessel.

Congress acted to remove from the longshoreman one of the bases for recovery from the shipowner, that is, unseaworthiness. The other basis for recovery, negligence, was left intact. Where a basis for recovery remains, the rules governing the amount of the longshoreman's recovery have not been changed by the Amendments. Congress did not repeal the doctrine of joint and several liability. Accordingly, where there is liability on the shipowner, full recovery of the longshoreman's damages must follow.

This Court long ago established the judicial precept that under the

Longshoremen's Act, reduction of the vessel owner's liability to the longshoreman on account of some stevedore negligence was not required. This rule, created in Halcyon, and refined in Pope and Talbot, has recently been reaffirmed by this Court. In Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974), this Court did allow contribution by a non-employer joint tort feasor. However, the Court took care to explain that where an employer is shielded by the Longshoremen's Act, contribution by the employer would be precluded. As the Court noted, "Halcyon was, and still is, good law on its facts." Id. at 115. See also Atlantic Coast Line R.R. v. Erie Lackawanna R.Co., 406 U.S. 340 (1972). For this Court to approve the fashioning of a remedy in the nature of that devised by the Fourth Circuit goes far

beyond Reliable Transfer. Reliable Transfer overruled a discredited judicial doctrine and brought United States Maritime Law into conformity with the rest of the world, but the Fourth Circuit opinion here flies in the face of the legislative history and of prior Supreme Court holdings, and rejects the general common law rule of joint and several liability.

The Fourth Circuit's remedy also has severe adverse effects on the longshoreman. Instead of being made whole by the combination of compensation benefits paid without fault and damages paid on account of third party negligence, the longshoreman would receive only part of his jury approved damages. But still he must repay the compensation received from the employer, pursuant to Section 33 of the Act. See also Federal Marine Terminals, Inc., v.

Burnside Shipping Co., 394 U.S. 404 (1969).

In short, it is the injured longshoreman who bears the brunt of the inequities of the Fourth Circuit's remedy. In view of the requirements that the Act be liberally construed in favor of the longshoreman and in such a way as to avoid harsh and incongruous results, Voris, supra; Northeast Marine Terminal, supra, the Fourth Circuit decision is particularly inappropriate. It is precisely because of this harsh inequity worked upon the longshoreman--the party least able to bear the inequity and the party most free from fault--that other courts have refused to reduce the longshoreman's damages on account of employer negligence. The following language from Santino v. Liberian Distance Transports Inc., 405 F.Supp. 34, 35 (W.D. Wash. 1975), quoted with

approval in Shellman, 528 F2d at 680, is instructive. The Court said:

> "Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. It would shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against the stevedore employer."

It is surely in keeping with the humanitarian purposes of the Act to permit the longshoreman to be made whole by recovery of the full amount of his damages.

Finally, it was the intention of Congress in the Amendments to abolish the circuitous third party suits of pre-1972 days. Congressional displeasure with the dissipation of stevedore resources in the circuitous third party suits was clear. S.Rep. at 4, 9.

Congress intended that the resources of the stevedore employer be husbanded for use in providing benefits to injured workers. Thus, Congress acted to keep stevedores out of any third party litigation by precluding any kind of recovery over by the shipowner. However, the effect of the Fourth Circuit's remedy is to bring the employer back into the negligence action. The employer must participate directly in the longshoreman's suit, or he will jeopardize his opportunity to recover the compensation payments he has made under the Act. For if the stevedore's concurrent negligence reduces the longshoreman's recovery, there will be less of a verdict available to repay the "compensation lien" of the stevedore. Petitioner submits that, as the Second Circuit concluded in Zapico v. Bucyrus-Erie Company, 579 F2d 714 (1978),

impairment of the stevedore's compensation lien is also the substantial equivalent of contribution.

Congress simply did not envision the stevedore having to participate in third party suits to prove his own freedom from fault. No such language can be found in either the statute or the legislative history. Yet the clear result of the Fourth Circuit decision is to bring the stevedore back into the litigation. In the case at bar, for example, the shipowner has paid the amount of the verdict, as assessed by the Fourth Circuit, into the district court and has interpleaded the employer/carrier, and longshoreman, who must now litigate the question of how the damages are to be divided. Compagnie Generale Transatlantique v. Edmonds, et al., C.A. No. 78-413-N (E.D. Va.). Obviously, such additional legal

involvement by the stevedore further dissipates stevedore resources and resurects the three party entanglement of pre-1972 days. If that development is approved by this Court, then Congress will have legislated in vain. The stevedore will be right back where he was prior to 1972. He will be paying compensation benefits (at greatly increased rates,) and he will be participating in the third party suits in an effort to safeguard his compensation lien.

The longshoreman, on the other hand, has given up his seaworthiness remedy under the Amendments, and under the Fourth Circuit interpretation he will also have lost his negligence action against the shipowner, as it existed prior to the Amendments. His judicially amended negligence remedy will permit him recovery only of the

amount that the shipowner's negligence contributed to the accident. The result is that the longshoreman will bear a burden borne by no other plaintiff under maritime or land based law. Plaintiff longshoreman must not only be prepared to show his own freedom from contributory fault, he must also show the freedom from fault of the non-party employer. However, Congress intended that the longshoreman be in the same position as a shore based worker insofar as third party suits are concerned. As the Senate Report says, "The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land. . .." S. Rep. at 11. If that Committee language means anything, it means that the

longshoreman should not be penalized for being injured aboard a vessel by imposing this additional burden on him. The Fourth Circuit's remedy clearly violates the expressed intent of Congress by placing the plaintiff longshoreman in a uniquely disadvantaged position.

It is important to remember that the Court here is involved in a question of statutory interpretation. The statute in question was the result of a long negotiating process involving representatives of workers, employers, and third parties. It is quite clear that the result is a politically balanced statute. This Court must be very careful before making any judicial revisions in such a creation of the Congress. This Court is called upon to interpret the statute as enacted by Congress; it is for Congress to alter or amend the

Act if that be necessary. If the vessel owner is dissatisfied with the statute and is dissatisfied with the fact that decisional law both prior to and subsequent to the Amendments has required payment of full damages by a concurrently negligent shipowner, then the Congress is the proper forum before which the shipowner should seek redress. This Court has previously recognized its limited authority to rewrite the Longshoremen's Act. Halcyon, 342 U.S., at 287. Other lower courts which have considered the instant question have also suggested that Congress, not the courts, should untertake any change necessary. See Shellman, 528 F2d at 680; Marant, 550 F2d at 551-52 (Van Dusen J., concurring); Santino, 405 F.Supp. at 35; Solsvik v. Maremar Compania Naviera, S.A., 399 F.Supp. 712, 714 (W.D. Wash. 1975). Therefore, the

Fourth Circuit remedy is inappropriate and requires reversal by this Court.

CONCLUSION

Wherefore, for the reasons set forth herein, petitioner prays this Court to reverse the En Banc split decision of the Court of Appeals for the Fourth Circuit and to enter judgment in favor of the petitioner for $90,000.00.

RESPECTFULLY SUBMITTED,

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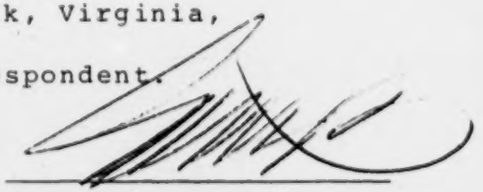
CERTIFICATE OF SERVICE

I, Calvin W. Breit, certify that on or before the 21st day of December, 1978, I mailed, postage prepaid, 40 copies of this Brief for the Petitioner to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles F. Tucker, Vandeventer, Black, Meredith and Martin, One Commercial Place, Virginia National Bank Bldg., Norfolk, Virginia, counsel for the respondent.



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I, Calvin W. Breit, certify that on or before the day of December, 1978, I mailed, postage prepaid, 40 copies of this Brief for the Petitioner to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles F. Tucker, Vandeventer, Black, Meredith and Martin, One Commercial Place, Virginia National Bank Bldg., Norfolk, Virginia, counsel for the respondent, Thomas D. Wilcox, Esquire, 919 Eighteenth Street, Washington, D.C. 20006, Attorney for Amicus Curiae National Association of Stevedores; Paul S. Edelman, Esquire, 99 Park Avenue, New York, New York 10016, Attorney for Amicus Curiae American Trial Lawyers Association; Randall C. Coleman, Esquire, 1600 Maryland National Bank Bldg., Baltimore, Maryland 21202, Attorney for Amicus Curiae American Export Lines,

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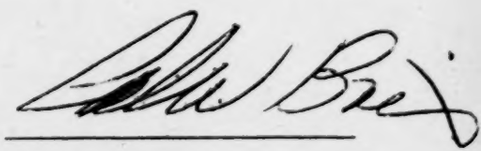
An additional ten (10) day period for making changes required by the Clerk was permitted by the Clerk on December 21, 1978.



Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

In The

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No. 78-479

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v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTE INVOLVED 2

STATEMENT 3

SUMMARY OF ARGUMENT 7

ARGUMENT:

Under The 1972 Amendments To The LHWCA A Shipowner Is Only Responsible For That Portion Of The Total Damages Attributable To Its Fault And Is Not To Be Held Responsible For The Fault Of The Stevedore.

I. The Statutory Language And The Legislative History Indicate That The Shipowner Is Only To Be Held Liable For Its Own Negligence 10

A. The Statutory Language 10

B. The Legislative History 14

II. The Rule Fashioned By The Court Below Is In Accord With The Admiralty Doctrine Of Comparative Fault 19

A. Comparative Fault Is Well Established In Admiralty 19

B. This Court Need Not Await Congressional Action 21

III. This Court's Decisions In *Halcyon Lines* v. *Haenn Ship Ceiling And Refitting Corp., 342 U.S. 282 (1952) And Pope And Talbot, Inc.* v. *Hawn, 346 U.S. 406 (1953)* Do Not Require Reversal Of The Decision Below 24

IV. The Concept Of "Joint And Several Liability" Is Not Involved In This Case 31

Page

V. A Rule Of Proportionate Fault Imposes No Unjustified Burden On The Injured Longshoreman 35

VI. Decisions From Other Circuits Support Affirmance Of The Decisions Below 37

VII. The Stevedore Is Not Entitled To Reimbursement Of Its Compensation Lien 40

A. Neither The Statute Nor Equitable Considerations Require Full Lien Reimbursement 40

B. The "Equitable Credit"—A Means For Dealing Fairly With The Lien Question 45

VIII. A Rule Of Proportionate Fault Will Not Unduly Burden The Stevedore Or Constitute A Return To Tripartite Litigation 50

CONCLUSION 53

CERTIFICATE OF SERVICE 54

TABLE OF CITATIONS

Cases

In re Allied Towing Corp., 580 F.2d 702 (4th Cir. 1978) 11, 14

American Casualty Company v. South Carolina Gas Company, 124 F. Supp. 30 (W.D.S.C. 1954) 44

American Motorcycle Association v. Superior Court, 20 Cal. 3rd 578, 146 Cal. Rptr. 182, 578 P. 2d 899, 906 (1978) 32

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) 11

Brown v. Southern Ry., 204 N.C. 668, 169 S.E. 419 (1933) 42

Page

Cella v. Partenreederei MS RAVENNA, 529 F.2d 15 (1st Cir. 1975) 52

Cooper Stevedoring Company v. Fritz Kopke Inc., 417 U.S. 106 (1974) 6, 9, 19, 24, 26

Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co., 115 F.2d 277 (4th Cir. 1940) 29, 30

Croshaw v. Koninklyke Nedlloyd B.V. Rijswijk, 398 F. Supp. 1224 (D. Ore. 1975) 20, 42

Dawson v. Contractors Transport Company, 467 F.2d 727 (D.C. Cir. 1972) 38

Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (9th Cir. 1975), cert. denied, 425 U.S. 944 (1976) 5, 21, 35, 36, 37

Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) 34

Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 514 (1949) 12

Fireman's Fund Indemnity Co. v. United States, 110 F. Supp. 937 (N.D. Fla. 1953), aff'd, 211 F.2d 773 (5th Cir. 1954) 44

Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) 22

Fontana v. Pennsylvania R. Co., 106 F. Supp. 461 (SDNY 1952) 40

Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31 (3rd Cir. 1975); *cert. denied,* 423 U.S. 1054 (1976) 11

Griffith v. Wheeling Pittsburgh Steel Corp., 452 F. Supp. 841 (W.D. Pa. 1978) 11, 14, 39

Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282 (1952) 6, 9, 24, 25, 26, 27, 28

Hubbard v. Great Pacific Shipping Co. Monrovia, 404 F. Supp. 1242 (D. Ore. 1975) 21

Jackson v. Lykes Bros. Steamship Co., 386 U.S. 371 (1967) 13

Page

Landon v. Leif Hoegh and Co., Inc., 521 F.2d 756, 763 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976) 35, 36

Lewellyn v. Harbison, 31 F.2d 740, 742 (3rd Cir. 1929) 12

Marant v. Farrell Lines, 550 F.2d, 142 (3rd Cir. 1977) 39

Meyer v. United States, 175 F.2d 45 (2d Cir. 1949) 12

Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978) 52

Moragne v. State Marine Lines, Inc. 398 U.S. 375 (1970) 22, 23

Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968) 35, 38, 39

Olivas v. United States, 506 F.2d 1158 (9th Cir. 1974) 51

Perchell v. District of Columbia, 444 F.2d 997 (D.C. Cir. 1971) 39

Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 19, 24

Reed v. S.S. YAKA, 373 U.S. 410 (1963) 13

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956) 17, 25, 27, 50

Samuels v. Empressa Lineas Maritimas Argentanas, 573 F.2d 884 (5th Cir. 1978), *pet. for cert. pending* 37

Sea-Land Services v. Gaudet, 414 U.S. 573 (1974) 22

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 8, 17, 18

Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1976) 4, 5, 21, 35, 36, 37

Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill.2d 1, 374 N.E.2d 437 (1978) 34

Smith v. Rivest, 396 F. Supp, 379 (E.D. Wis. 1975) 28

Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975) 52

The Etna, 138 F.2d 37 (3rd Cir. 1943) 40, 41

Page

Trevellick v. Flota Mercante Grancolumbiana, S.A., (N.D. Calif. C-77-1604-WHO January 19, 1979) 53

United States v. Reliable Transfer Company, 421 U.S. 397 (1975) 6, 8, 19, 21, 22, 23, 39, 47

Valentino v. Rickners Rhederi, G.M.B.H., 552 F.2d 466 (2d Cir. 1977) 52

Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641 (1961) 42

Zapico v. Bucyrus Erie Co., 579 F.2d 714, 718 (2d Cir. 1978) 29

Statutes

5 U.S.C. §8101 38
28 U.S.C. §1254(1) 2
33 U.S.C. §901 2
33 U.S.C. §902 8
33 U.S.C. §904 17
33 U.S.C. §905(b) 2, 5, 10, 11, 12, 13, 14, 28, 30, 35
33 U.S.C. §908(c) 33
33 U.S.C. §932 33
33 U.S.C. §933 ..... 42, 43
33 U.S.C. §933(f) 13

Rules

F.R. Civ. P. 24 52

Regulations

20 C.F.R. §703.001 33

Congressional Reports

H.R. Rep. No. 92-1441, 92 Cong. 2d Sess., (1972) U.S. Code Cong. & Ad. News, 4698 (1972) 11, 49

Page

S. Rep. No. 92-1125, 92 Cong. 2d Sess (1972) 13, 14, 47

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Miscellaneous

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals sitting *en banc* (Pet. App. 49)[1] is reported at 577 F.2d 1153. The panel decision of the Court of Appeals dated May 6, 1977 (Pet. App. 22), is reported at 558 F.2d 186. The memorandum order of the United States District Court for the Eastern District of Virginia dated March 3, 1976 (Pet. App. 15), is not reported; the initial decision of the United States District Court for the Eastern District of Virginia dated September 3, 1975 (Pet. App. 1), is not reported.

[1] The opinions below are reproduced in the Appendix to the Petition for Certiorari and will be referred to by the reference "Pet. App.". The Joint Appendix will be referred, to by the reference "App."

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1978. No petition for re-hearing was filed. The petition for a writ of certiorari was filed on September 11, 1978. The petition was granted on November 6, 1978. The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether in an action brought by an injured longshoreman under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter LHWCA) a defendant shipowner is only responsible for that portion of the total damages attributable to its negligence.

STATUTE INVOLVED

33 U.S.C. § 905(b), as amended, provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT

On March 3, 1974, the SS ATLANTIC COGNAC, a vessel owned by the respondent shipowner, arrived at the Portsmouth Marine Terminal in Portsmouth, Virginia. The ATLANTIC COGNAC is a large containership which carries both lift-on/lift-off containers which are transported on deck and roll-on/roll-off containers or trailers which are stowed on vehicle decks. Nacirema Operating Company, Inc., an expert stevedoring company, had been engaged by the shipowner to discharge certain containers and trailers from the vessel.

Stanley Edmonds was a longshoreman employed by Nocirema and on the morning of March 3, 1974, he was a member of a longshore gang which had been sent by Nacirema to discharge certain trailers. Edmonds was injured when he walked behind one of the trailers which was in the process of being removed by employees of Nacirema. Edmonds walked behind the trailer in order to remove one of the securing jacks and while he was behind the trailer a truck-like vehicle called a hustler which was operated by one of his fellow longshoremen backed up into the container causing it to move backwards and pin Edmonds between the trailer and the vessel's bulkhead. There was conflicting evidence with regard to whether one of the vessel's crew members directed Edmonds to remove the jack from behind the trailer.

The case was initially tried on March 6, 7, and 10, 1975, before Judge Richard B. Kellam and a jury and after a verdict was rendered in favor of Edmonds a motion for a new trial was filed and subsequently Judge Kellam entered an order setting aside the jury verdict because of certain errors in the charge to the jury.

The case was retried before Judge John A. MacKenzie on December 16 and 17, 1975. In instructing the jury at the second trial, Judge MacKenzie directed that the jurors complete a special verdict form in which they were to state in terms of a percentage the extent to which the negligence of the shipowner contributed to Edmonds' injuries, the extent to which the negligence of Stanley Edmonds contributed to his own injuries and the extent to which the negligence of Edmonds' stevedore-employer Nacirema Operating Company, Inc., contributed to the injuries (App. 5-9). The jury determined that Edmonds' total damages were $100,000.00, that his own negligence contributed 10 percent to the total damages, that Nacirema's negligence contributed 70 percent and that the shipowner's negligence contributed only 20 percent (App. 10-11).

Following the return of the jury verdict the Court requested that the parties submit briefs with regard to whether the judgment in favor of the shipowner should be in the sum of $20,000.00 (20 percent of the total damages as determined by the jury) or $90,000.00 (90 percent of the damages as determined by the jury). The Court ruled that the damages should only be reduced by the percentage of the plaintiff's own negligence and should not be reduced by the percentage negligence of the plaintiff's stevedore-employer. In reaching this result the Court felt bound by recent decisions of the Ninth Circuit in *Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976)

and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 699 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).[2]

However, Judge MacKenzie noted that he was reaching his conclusion "reluctantly" and in his view a rule which required that the shipowner only be responsible for that portion of the total damages attributable to its fault was a result which was compatible with the statutory language of 33 U.S.C. § 905(b) and he legislative history of the 1972 Amendments to the LHWCA (Pet. App. 18-19).[3]

The case was initially heard in the United States Court of Appeals before a three-judge panel consisting of Judges Widener, Butzner and Hall. In an opinion written by Judge Widener and concurred in by Judge Butzner the panel held that the shipowner was only responsible for that portion of the total damages attributable to its fault ($20,000.00), but the panel also required that in addition the shipowner should repay the stevedore its compensation lien. The Court noted that the 1972 Amendments to the LHWCA were designed to "strike a balance between the relative rights and liabilities of the three parties generally involved in litigation under the Longshoremen's Act, the injured longshoreman, his stevedore employer, and the owner of the vessel," 558 F.2d 190 (Pet. App. 31). The Court referred to this Court's decisions

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[2] In both *Shellman* and *Dodge* the Court indicated that while there was an inequity present in holding the shipowner responsible for the full amount of the damages including that portion of the damages cause by the negligence of the stevedore-employer, this was a matter which should be remedied by legislation rather than by the courts.

[3] In reaching its decision the Court below noted that it was doing so "reluctantly" and the Court stated:

> "It now appears that a 20 percent negligent shipowner must bear the entire brunt of the damage award without contribution from a 70 percent negligent employer-stevedore, who not only pays not one cent but recovers the compensation benefits paid to the employee. We invite the Court of Appeals of this Circuit to examine this matter." (Pet. App. 20-21).

in *Cooper Stevedoring Company v. Fritz Kopke*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Company*, 421 U.S. 397 (1975), and indicated: "Suffice it to say that we read them as emphasizing that courts of admiralty should formulate 'flexible and fair remedies in the law maritime,' " 558 F.2d at 193 (quoting *Reliable Transfer, supra* at 409).

Though holding the vessel responsible only for its negligence the panel was concerned about this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952), and felt that it could not deny to the stevedore repayment of its compensation lien. Thus, the Court held that in addition to paying the plaintiff the $20,000.00 judgment the shipowner should also reimburse the stevedore for its compensation lien.

A Petition for Rehearing was filed by Stanley Edmonds and the matter was reheard by the Fourth Circuit sitting *en banc*. Judge Haynsworth writing for the majority held that the shipowner is only liable for that portion of the total damages attributable to its fault ($20,000.00) but the *en banc* court declined to rule on whether the stevedore was entitled to reimbursement of its compensation lien suggesting instead that the shipowner pay the $20,000.00 into the District Court and interplead the longshoreman and stevedore.[4] The Court noted that the drafters of the 1972 Amendments repeatedly emphasized in the House and Senate Committee Reports that the vessel was not to be chargeable with the negligence of the employees of the stevedore, and it found in this legislative history clear intent on the part of Congress to limit the vessel's liability to the damage which

[4] The respondent shipowner has paid these sums into the court and a complaint in interpleader has been filed in The United States District Court for the Eastern District of Virginia.

it has caused through the application of principles of comparative negligence and stated:

> In the 1972 Amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore, and it is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship may have been only slightly at fault and the stevedore very greatly so, 577 F.2d at 1155 (4th Cir. 1978) (Pet. App. 56-57).

Such a result in the view of the Court below was not a harsh result from the point of view of the longshoreman, for "[h]e is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury." *Id* at 1156 (Pet. App. 58)[5]

SUMMARY OF ARGUMENT

In 1972 Congress amended the LHWCA in several important respects. Among other things Congress increased substantially the benefits payable under the Act, removed fixed ceilings from disability benefits, eliminated the longshoreman's right to sue a vessel for unseaworthiness under

[5] Both the panel opinion and the *en banc* decision also discussed the question of whether Judge Kellam erred in granting a new trial to the shipowner on the basis of errors in the charge at the first trial. Both the panel decision and the *en banc* decision indicated that there was no error in Judge Kellam's decision to grant a new trial and that portion of the judgment below was affirmed. The issues relating to the propriety of the grant of a new trial are not before the Court in this proceeding and the only issue present here is whether the Court of Appeals correctly held that the shipowner is only responsible for that portion of the total damages attributable to its fault.

the doctrine of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946), denied to the vessel owner the right to seek indemnity from the stevedore based upon a breach of the stevedore's warranty of workmanlike service and expanded the coverage provisions of the Act so as to include certain classes of shoreside workers. Congress accomplished its purpose principally by amending the definition of "employee" set forth in 33 U.S.C. § 902 and by adding a new subsection (b) to § 905 of the Act.

The amended § 905(b) eliminated the longshoreman's right to sue the vessel for unseaworthiness and now the injured longshoreman is permitted to sue the shipowner only on a negligence theory. But because the warranty of seaworthiness is no longer applicable, Congress denied to the shipowner the right to seek indemnity from the stevedore based upon a breach of the stevedore's warranty of workmanlike service.

The 1972 Amendments to the LHWCA do not deal specifically with the situation where the negligence of the stevedore and the vessel owner combine to cause injuries to a plaintiff longshoreman. However, this Court is not without guidance since the statute itself and the legislative history indicate that while Congress intended to preserve the injured longshoreman's right to sue the vessel owner is negligence, Congress did not intend that the vessel owner would be held responsible for the negligence of the stevedore.

Since Congress has not enacted specific legislation to deal with this concurrent fault situation, it is apparent that the fashioning of such rules in this area has been left to the Courts and such rules should be fashioned in accordance with traditional admiralty concepts of comparative fault. The power of admiralty courts to fashion fair and equitable rules of proportionate fault was recently reemphasized in the recent decisions of *United States v. Reliable Transfer Company, Inc., supra,* and *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., supra.*

This was recognized in the *en banc* decision below holding that the shipowner should only be responsible for that portion of the total damages attributable to its fault. Petitioner and his supporting *amici* assert that the shipowner should be held liable for not only damages attributable to its fault but also those damages caused by the fault of the plaintiff's employer, the stevedoring company, and they rely on the concept of "joint and several liability" to support their thesis. Concepts of joint and several liability as have existed at common law have no application since the shipowner and the stevedore are not "joint tortfeasors" such that the rule can apply. Moreover, the underlying justification for the common law rule of joint and several liability is not present here by virtue of the compensation scheme and increased benefit levels now available to injured workers under the LHWCA.

A rule of proportionate fault does not work an unjustified burden on the injured longshoreman since he is fully and adequately compensated for the negligence of his employer through the receipt of compensation benefits without proof of fault. The fact that he may receive less in a given case by way of compensation than he might receive from a jury is merely reflective of the trade-offs present in a workmen's compensation system. Moreover, requiring that the shipowner only pay its portion of the total damages is not a form of contribution and hence this Court's decision in *Halcyon v. Haenn Ship Ceiling and Refitting Corp., supra,* even if deemed still viable, does not bar implementation of such a rule of proportionate fault. The stevedore under the holding below is never required to pay more than its compensation obligations under the LHWCA and can never be made to pay more.

While the stevedore's compensation lien was not dealt with by the Court below *amicus* Liberty Mutual Insurance Company suggests in its brief that it is entitled to full repayment of compensation payments made to Edmonds out of any recovery he may obtain from the shipowner. We submit that there is nothing in the statute to require such a result and equitable considerations dictate that full lien reimbursement be denied where the stevedore's negligence causes all or a portion of the damages.

ARGUMENT

Under The 1972 Amendments To The LHWCA A Shipowner Is Only Responsible For That Portion Of The Total Damages Attributable To Its Fault And Is Not To Be Held Responsible For The Fault Of The Stevedore.

I.

The Statutory Language And The Legislative History Indicate That The Shipowner Is Only To Be Held Liable For Its Own Negligence

A. The Statutory Language

33 U.S.C. § 905(b) as amended, provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

While the statutory language does not explicitly deal with the question of the joint negligence of vessel and employer, it does contain evidence to indicate that the vessel is to be held only for the damages chargeable to its own negligence. The first sentence of § 905(b) grants a general right of recovery against the vessel for negligence. The second and third sentences are qualifications of the grant dealing with the special situation in which the employer, who would otherwise not be subject to suit, is also an owner or other party identified as a "vessel" against whom a right is granted in the first sentence. In such a case the employer is viewed for the purposes of the Act in two different capacities, on the one hand as vessel owner subject to suit and on the other hand as a stevedore liable to provide compensation benefits. *See* H.R. Rep. No. 92-1441, 92 Cong. 2d. Sess., [1972] *U.S. Code Cong. & Ad. News,* 4698, 4702-3 (1972). See *Griffith v. Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975); *cert. denied,* 423 U.S. 1054 (1976); *In re Allied Towing Corp.,* 580 F.2d 702 (4th Cir. 1978).

There is a "natural presumption" that when the same words are used in different parts of a statute they are intended to have the same meaning, *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932), and it is generally held that identical words used in the same

section more than once will be so construed. *Meyer v. United States,* 175 F.2d 45, 47 (2d Cir. 1949); *Lewellyn v. Harbison,* 31 F.2d 740, 742 (3rd Cir. 1929).

If "the negligence of a vessel" in the first sentence is read to mean any negligence of the vessel at all and "the negligence of persons" in the second sentence is given a similar reading to refer to any negligence at all, then an absurd inconsistency of results appears, since the employee of an independent contractor, subject only to the first sentence, will then recover 100 percent of his damages even though his fellow employees rendering stevedoring services have committed 99 percent of the negligence, while a longshoreman employed by the vessel owner and subject to the qualification of the second sentence, would recover none of his damages at all if his fellow longshoremen committed even one percent of the negligence.

Thus § 905(b) cannot be read literally throughout and must be internally reconciled. The section may be harmonized by recognizing that the words "caused by the negligence" in the first, second, and third sentences contemplate not just the fact but the extent of causation. The words "if the injury was caused" in the second and third sentences should be read to mean "to the extent the injury was caused" and the first, or granting, sentence should accordingly be construed as qualified in the same way, to conform to the specific exceptions stated in the second and third sentences following it.

The interpretation of all three sentences in this way, authorizing recovery of the portion of damages allocable to the shipowner, averts a collision of principle between these sentences and achieves consistent results in the cases with which they deal. If possible, all sections of a statute must be reconciled so as to produce a symmetrical and harmonious whole. *See, e.g., Federal Power Commission v. Panhandle Eastern*

Pipe Line Co., 337 U.S. 498, 514 (1949). Moreover, the result would comply with the expressed legislative intent, ". . . that the same principles should apply is determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." S. Rep. No. 92-1125, 92 Cong. 2d Sess. at 12.

The resulting rule is the only possible rule consistent with the terms of the Act which is completely equitable. It charges the vessel owner with only his fair share of the damages done and leaves the longshore worker protected, since, he retains the right to receive future compensation benefits from his employer. See 33 U.S.C. § 933(f).

The Court below, 577 F.2d at 1155 (Pet. App. 55), recognized that this interpretation of the statutory language was the only way to harmonize the language of the first and second sentences of § 905(b). The Court correctly notes:

> The evident meaning and intention of the Congress was to provide for liability of the ship to the extent its fault contributed to the injury, while insulating it against liability to the extent that the stevedore's fault contributed to the injury.

Petitioner and his supporting *amici* suggest that the first and second sentences of § 905(b) were only designed to cover the situation where a shipowner acts as its own stevedore so as to preserve rights granted to longshoremen by *Reed v. S. S. YAKA,* 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967). We submit this language is not designed *solely,* as suggested by petitioner, to deal with the limited situation where a shipowner acts as its own stevedore, for while these statutory provisions do confer certain rights on longshoremen which they would not otherwise have where shipowners act as their own stevedore, the provisions also serve to emphasize that shipowners

are not to be held liable for the negligence of stevedores. This was noted by Judge Haynsworth in the *en banc* decision below:

> More importantly, the second sentence of § 905(b) seems a firm declaration that the ship should not be required to pay for injuries to the extent that they were caused by people providing stevedoring services. 577 F.2d at 1155, (Pet. App. 57)

Principal reliance is placed on *Griffith v. Wheeling Pittsburgh Steel Corp., supra,* by petitioner for the proposition that Judge Haynsworth misconstrued § 905(b). The Third Circuit's opinion in *Griffith,* however, concerned only the fact of a shipowner's liability, and not its extent. On remand, the District Court apportioned liability between the 50 percent negligent shipowner and the owner *pro hac vice,* which was found 20 percent negligent while acting in its capacity as shipowner. The latter's 25 percent negligence caused by stevedoring negligence was not recoverable, since "[r]ecovery for such negligence takes the form of plaintiff's workmen's compensation payments." *Griffith v. Wheeling Pittsburgh Steel Corp.,* 452 F. Supp. 841, 847 (W.D. Pa. 1978). The Fourth Circuit reached a similar result in *In re Allied Towing Corp., supra,* decided less than one month after that court's *en banc* opinion in *Edmonds.* In *Allied Towing,* the *Edmonds* apportionment was held appropriate where the shipowner also performed its own ship repair work.

B. The Legislative History

The legislative history of the 1972 Amendments to the LHWCA is set forth in nearly identical House and Senate Reports.[6] Both Congressional Reports contain a section entitled "Elimination of Unseaworthiness Remedy" in which

[6] S. Rep. No. 92-1125, 92 Cong. 2d Sess. (1972) and H. R. Rep. No. 82-1441, 92 Cong. 2d Sess, [1972] U.S. Code Cong. & Ad. News 4698 (1972).

the committees articulated the basis of the new "negligence" remedy and as Judge Haynesworth noted in the *en banc* opinion below in the Committee reports: "[i]t was repeatedly emphasized that the vessel would be chargeable only with its own negligence and that it would not be chargeable with the negligence of the employees of the stevedore." 577 F.2d at 1156, n. 2. (Pet. App. 56-57)

Petitioner and *amicus* Liberty Mutual Insurance Company make reference to the Committee hearings and suggest that since little reference was made in those hearings to limiting the shipowners liability to that portion of the damage attributable to its fault that Congress somehow intended to create a system which would require the shipowner to pay damages based on the negligence of the stevedore.

In order to properly evaluate the legislative history and glean from a voluminous record the intent of Congress in this area it is necessary to look closely at the state of the law regarding third-party actions as it had existed prior to 1972 as well as the nature of the bills introduced in 1971 and 1972.

The bill that was ultimately reported out by the House and Senate Committees and enacted into law was radically different than the draft bills initially introduced in the House and Senate. The administration bills introduced in the Senate by Senator Prouty (S. 525) and in the House by Representative Quie (H.R. 3505) sought to change the definitions of "employer" in § 2 of the Act to include "any vessel as defined herein" and the term "vessel" to mean "a vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury. . . ." By making a vessel an employer within the meaning of the Act the administration bills would have made compensation benefits an injured longshoreman's exclusive remedy even where the injury was due to the negligence of the vessel.

The other principal bills under consideration were introduced by Senator Williams (S. 2318) and Representative Daniels (H.R. 12006). These bills would have increased the disability and death benefits under the Act, but made no change in the existing law insofar as it related to third-party actions. Thus it is not surprising that the issue of how to apportion a third-party recovery when a stevedore and shipowner were both negligent was discussed, at most obliquely, during the Committee hearings.

The bill which was ultimately enacted was reported out after a meeting attended by representatives of labor and industry, Committee members and Committee staff.[7] Many issues were discussed at that meeting and compromises were reached on many key issues which had been the subject of considerable controversy including benefit levels, the unrelated death benefit, procedural changes in the compensation system and extension of the LHWCA to certain shoreside areas. However, the participants at this meeting were unable due to the time pressures involved in reporting out a compromise prior to adjournment to agree on a formula for apportioning fault between shipowners and stevedores. Thus the fashioning of equitable rules to be applied in joint fault situations was, like the outline of the new "negligence" remedy, to be fashioned by the Courts. Coleman and Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 35 Md. L. Rev. 351, 372-373 (1976).

However, the Congress gave considerable guidance to the

[7] Senator Williams made reference to this meeting in discussing the bill he introduced (S-2318) and the amendments made during this meeting: "Subsequent to the hearings in an unprecendented fashion representatives from organized labor, from management from the administration sat down together and hammered out the provisions of a decent, fair and important Workmen's Compensation Act".

Courts in this regard by unequivocally stating in the Committee Reports that "a vessel shall not be liable in damages for acts or omissions of stevedores . . .", H.R. Rep., *supra,* at 4703, and in noting that "the admiralty concept of comparative negligence" will apply to negligence actions brought subsequent to the Amendments.

Moreover, both the House and Senate Committees were aware of the inequities which had arisen under judicial decisions of this Court construing the LHWCA, particularly *Seas Shipping Co. v. Sieracki, supra,* and *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). *Sieracki* held that a longshoreman working on board a vessel was entitled to the benefit of the warranty of seaworthiness which prior to that time had only been available to members of a vessel's crew. As a result of this decision, the shipowner for all intents and purposes became absolutely liable for injuries to longshoremen working on board the vessel even where the unseaworthy condition was created by the stevedore. Moreover, by virtue of the exclusive remedy language of § 904 of the Act and this Court's decision in *Halcyon, supra,* the shipowner could not obtain contribution or indemnity from the stevedore.

Then in 1956 this Court handed down its decision in *Ryan* which held that the shipowner could obtain full indemnity from the stevedore where the injury was due to a breach of a warranty of workmanlike service on the part of the stevedore. While *Ryan* provided relief to shipowners it created another inequity in that the stevedore in most cases was held responsible for the full amount of the damages even though the shipowner may have been partially at fault.

It was with this background that Congress enacted the 1972 Amendments in an effort to strike a compromise. This compromise restricted the liability of the stevedore to the payment of compensation benefits under the Act and ship-

owners were to be held liable only for the consequences of their own negligence. Petitioner argues that a shipowner is to be held responsible for all damages even those attributable to the negligence of the stevedore and would require the shipowner to suffer the same inequity which prevailed during the years subsequent to *Sieracki* and prior to *Ryan*. We submit that the legislative history discloses no such intent. A participant at the hearings on the 1972 Amendments noted with regard to this phrase in the House Report:

> An interesting point is raised by the Committee reports in the following language: '... The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore. It is apparent from this language that Congress did not intend for the shipowner to be responsible for more than its proportionate part of a longshoreman's damages in a situation where the accident resulted from the concurrent negligence of the shipowner and the stevedore.

Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 41 Ins. Counsel J. 63, 66 (1974).

Thus Congress clearly intended that an equitable system of proportionate fault was to apply to actions brought under the LHWCA, as amended in 1972, and left the formulation of the details of that system to the Courts. The Court below in its *en banc* decision has formulated a fair and workable system of proportionate fault which is fully consistent with the Congressional mandate.

II.

The Rule Fashioned By The Court Below Is In Accord With The Admiralty Doctrine Of Comparative Fault

A. Comparative Fault Is Well Established In Admiralty

The doctrine of comparative negligence has been uniformly applied in cases brought by longshoremen as well as seamen for ship-board injury actions (maritime torts). *See generally Pope and Talbot, Inc., v. Hawn,* 346 U.S. 406 (1953). Moreover, sharing of liability among parties whose actions have concurred to bring about a loss has long been a rule of admiralty in collision cases. In 1974 this Court extended the rule permitting contribution among joint tortfeasors to non-collision cases in order to ameliorate "the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra* at 111.

The apportioned damages rule was recently reaffirmed and expanded in *United States v. Reliable Transfer Co., Inc., supra,* at 111. The Court was required in that case to decide whether this country's century-old admiralty rule of equally dividing damages in collision cases should be replaced by a rule requiring allocation of liability for damages in proportion to the relative fault of each party.

In *Reliable Transfer* the lower Court found that the running aground of the coastal tanker MARY A. WHALEN was caused 25 percent by the failure of the United States Coast Guard to maintain a breakwater light and 75 percent by the fault of the vessel. In accordance with the old rule, however, the trial court required that each party pay one-half the damage to the vessel. This Court condemned the old rule as unfair, illogical, arbitrary, archaic and frequently unjust, and noted that such a result hardly commended itself

to one's sense of justice any more than did the common law doctrine of contributory negligence. The primary policy recognized by the Court was "that a vessel is primarily negligent does not justify its shouldering all responsibility nor excuse the slightly negligent vessel from bearing any liability at all." *Id.* at 406. Accordingly, the Court rejected the former collision rule and adopted the rule requiring allocation of liability for damages in proportion to the relative fault of each party, the idea being to obtain "just and equitable allocation of damages . . . (a) goal (which) can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible." *Id.* at 411.

Therefore, it is clear that division of damages based upon comparative fault is favored, and should be adopted in all cases absent specific legislative direction to the contrary. This Court, in connection with claims arising under the 1972 Amendments to the LHWCA is free to apply any rule which equitably distributes liability, and which is not barred by the explicit wording of the statute, or the legislative history of the Amendments. The report of the House Committee on Labor and Education clearly states the Committee's intention that the admiralty concept of comparative negligence should be applied and requiring that the shipowner only pay that portion of the total damages attributable to its fault is fully consistent with the policy behind the rule of comparative negligence as set forth in *Reliable Transfer.*[8]

[8] A good discussion of the reasons why such a rule should be adopted is contained in *Croshaw* v. *Koninklijke Nedlloyd B.V. Rijswijk,* 398 F.Supp. 1224 (D. Ore. 1975). The Court in *Croshaw* determined that the plaintiff's own negligence was 50 percent responsible for his injuries, the shipowner's negligence was 20 percent responsible, and the stevedore's negligence was 30 percent responsible. While the defendant shipowner urged that the plaintiff's recovery should be reduced by the

B. This Court Need Not Await Congressional Action

Inherent in the Ninth Circuit's decisions in *Shellman v. United States Lines, Inc., supra,* and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, supra,* and petitioner's arguments in the present case is the premise that the Courts should defer consideration and implementation of a system of proportionate fault in actions brought pursuant to the LHWCA pending specific statutory authorization by Congress. We submit that such arguments are without merit given the fact that there is evidence that Congress, in drafting the 1972 Amendments intended that the judiciary formulate appropriate rules within the framework of the favored Congressional policy of comparative fault. Moreover, since

percentage of the stevedore's negligence, the Court felt that it could not grant such a request because the Chief Judge of the District of Oregon had ruled in the previous case of *Hubbard* v. *Great Pacific Shipping Co. Monrovia,* 404 F.Supp. 1242 (D. Ore. 1975) that a defendant shipowner was not entitled to such a credit. However, while the Court in *Croshaw* felt it must conform to *Hubbard* in order to maintain uniformity of law within the District, the Court clearly indicated that in its view the 1972 Amendments required that the shipowner only be held responsible for that portion of the damage attributable to its fault.

The Court in *Croshaw* examined in detail § 905(b) of the Act and the legislative history, and noted that Congress expressly authorized the application of the doctrine of comparative negligence in third party actions brought under the Amendments. The Court further noted that this Court in *United States* v. *Reliable Transfer, Inc.,* had changed the rule of divided damages in collision cases and had condemned the application of a rule which subjects a joint tortfeasor to an arbitrary level of damages despite minimal culpability. The Court stated:

> This same intolerance for arbitrary and inequitable damage rules which motivated the *Reliable Transfer* decision moves me to adopt the approach I have outlined today. *Reliable Transfer* overruled a century and a half of judicial precedent. I need not overcome such formidable obstacles. The 1972 Amendments expressly authorize comparative negligence. Congress has left the mechanics of its application to the courts, as is customary.

398 F. Supp. at 1233.

"Congress has largely left to [the Supreme Court] the responsibility for fashioning the controlling rules of Admiralty law," *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20 (1963), the judiciary has the power, even absent an express or implied Congressional direction, to adopt a proportionate fault system whereby the shipowner is only required to pay the damages caused by its fault.

In both *Reliable Transfer* and the recent cases of *Moragne v. State Marine Lines, Inc.,* 398 U.S. 375 (1970) and *Sea-Land Services v. Gaudet,* 414 U.S. 573 (1974), the Supreme Court has recognized that under the admiralty power the judiciary has wide latitude to formulate substantive rules of law.[9]

In *Reliable Transfer* the respondent advanced the same argument made by petitioner in the present case: that formulation of a rule of proportionate fault such as the one adopted by the Court below is a task for Congress not the Courts.

The Supreme Court rejected this argument stating:

> Finally the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime and 'Congress has left to this Court the responsibility for fashioning the controlling rules of admiralty law' (citations omitted). No statutory or judicial precept precludes a change in the rule of divided damages and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases. 421 U.S. at 409.

[9] The Constitution of the United States provides that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ." U.S. Constitution Article III, § 2.

Similarly, in *Moragne,* the Supreme Court examined in detail the various statutes enacted by Congress governing the allowance for recovery for wrongful death, and concluded that while Congress had never dealt specifically with wrongful death actions occurring within state territorial waters, nevertheless the Court could find "that Congress has given no affirmative indication of an interest to preclude the judicial allowance of a remedy for wrongful death." Thus, the Supreme Court in order to remedy what it considered to be an absurd anomaly in the law, created a non-statutory maritime cause of action for wrongful death.

In the present case, if a rule of proportionate fault is not adopted, the shipowner is faced with an unfair and unjust situation, where, though determined to be only 20 percent negligent, nevertheless, it must bear 90 percent of the plaintiff's damages. The same type of unfairness and absurdity which motivated this Court in *Moragne* and *Reliable Transfer* is present in this case. Congress has specifically approved the concept of proportionate fault and there is nothing in the statute or the legislative history which even suggests that Congress intended to exclude the application of proportionate fault concepts such as that adopted by the Court below. Thus, in the absence of explicit Congressional direction to the contrary, this Court, consistent with the policy set forth in *Reliable Transfer* favoring fair and equitable rules of proportionate fault, should affirm the decision below.

III.

This Court's Decisions In Halcyon Lines v. Haenn Ship Ceiling And Refitting Corp., 342 U.S. 282 (1952) And Pope And Talbot, Inv. v. Hawn, 346 U.S. 406 (1953) Do Not Require Reversal Of The Decision Below

Petitioner refers to this Court's decision in *Halcyon* and indicates that the establishment of a rule of proportionate fault whereby a shipowner is only to be held responsible for its portion of the damages is violative of the no-contribution rule of *Halcyon* and its corollary *Pope and Talbot v. Hawn, supra.*

The facts of *Halcyon* are quite simple. Salvador Baccile, an employee of Haenn Ship Ceiling and Refitting, was injured aboard a ship owned by Halcyon Lines. The jury determined that Haenn was 75 percent responsible and Halcyon 25 percent responsible for the damages. The Court of Appeals ordered that Haenn, Baccile's employer, contribute *damages* in an amount not to exceed the compensation benefits to which Baccile would be entitled. The Supreme Court reversed, stating that it would not judicially apply the doctrine of contribution to non-collision cases in the absence of direct congressional guidance.

In *Hawn* a carpenter was injured as a result of the concurring negligence of his employer and the shipowner. Relying on its prior decision in *Halcyon* the Court held that the judgment against the shipowner should not be reduced by the amount of the compensation benefits paid to Hawn by his employer since that would be the equivalent of contribution.

Both *Halcyon* and *Hawn* are precedents more than a quarter of a century old. In the interim there have been vast changes in the LHWCA by virtue of the 1972 Amendments; this Court in *Cooper Stevedoring Co. v. Fritz Koepke, Inc., supra,* has specifically held the doctrine of contribution ap-

plicable in non-collision admiralty actions thus emasculating the primary holding of *Halcyon;* and indemnity jurisprudence based upon *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., supra,* and its warranty of workmanlike service was judicially created and legislatively overruled.[10]

Moreover, the LHWCA at the time of the *Halcyon* case was far different than the present Act. The Supreme Court in *Halcyon* in reversing the decision of the Third Circuit indicated that it would not apply the doctrine of contribution to non-collision maritime cases and the Court did not have occasion to deal with the question of the stevedore's compensation lien. The LHWCA as it existed in 1952, at the time of the *Halcyon* case, required the employee to elect whether he would accept compensation or proceed with an action against a third-party tortfeasor and at that time the injured longshoreman could not obtain an adjudication of the amount of workman's compensation benefits due or to become due. Thus, at the time of trial, it was impossible to determine the amount of statutory compensation benefits to which the injured employee would be entitled and any contribution judgment which the vessel owner would obtain from the stevedore would only be payable to the shipowner on a weekly basis. Thus, both parties in *Halcyon* acknowledged that the Third Circuit's decision which limited the employer's liability for contribution to the amount of compensation benefits paid or to become due was unworkable and the Court noted that "[b]oth parties claim that the decision below limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable." 342 U.S. at 284.

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[10] Learned commentators have suggested that *Halcyon* is no longer viable and the Court's attention is directed to *Coleman* and *Daly,* supra at 392-397.

Today this situation no longer exists. By virtue of the 1959 Amendments to the LHWCA the injured worker need not elect whether to receive compensation or to pursue a third-party suit and the longshoreman can proceed within the administrative framework set up in the Department of Labor to obtain a prompt adjudication of the amount of compensation benefits to which he is entitled either during informal proceedings before the Deputy Commissioner or at a formal hearing before an Administrating Law Judge. Even in cases involving death and permanent disability the amount of benefits, even those to be paid in the future, can be accurately projected based upon the life expectancy of the beneficiary. Thus by the time most third-party actions come to trial the amount of the compensation lien is either liquidated or easily calculated.

The basic no-contribution holding of *Halcyon* has now been overruled by the subsequent decision of *Cooper Stevedoring Co., supra.* While *Cooper* does indicate that *Halcyon* is still viable in the limited situation wherein contribution is sought from an employer who is statutorily immune from suit, this Court emphasized that its holding was based principally on the fact that Congress in enacting the 1972 Amendments to the LHWCA had sought to "re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy." 417 U.S. at 112-13.

Thus to the extent that *Halcyon* limited the employer's liability to its obligations under the Act it is still good law, and since the holding of the Court below does not require that an employer contribute "damages," there is nothing in *Halcyon* to prohibit implementation of a system whereby the shipowner is liable only for its portion of the damages. This rule in no way increases the stevedore's obligation to its em-

ployee since its potential liability is never any greater than its compensation exposure under the LHWCA.

Similarly *Hawn* must be viewed in its historical context. In 1953, at the time of the decision in *Hawn,* an injured longshoreman could sue the shipowner for unseaworthiness under the *Sieracki* doctrine, yet the shipowner had no recourse against the stevedore for contribution by reason of *Halcyon.* Moreover, since *Ryan Stevedoring Corp. v. Pan-Atlantic Steamship Co., supra,* had not yet been decided the shipowner did not have a right of indemnity either. Since the shipowner was responsible, by virtue of *Sieracki,* for all of the injured longshoreman's damages, and no claim over against the stevedore was available to the shipowner, the stevedore was always entitled to recoup its entire compensation lien in order to prevent double recovery by the injured longshoreman. Thus any reduction in the shipowner's liability would be a form of contribution under the state of the law as it existed in 1953.

However, under the LHWCA as it exists by virtue of the 1972 Amendments, the vessel owner's liability is only to be based on its own negligence, not on the fault of the stevedore as was the case under the unseaworthiness doctrine. Since the vessel owner need only pay damages to an injured longshoreman under the 1972 Amendments for the damages attributable to its own fault, no danger of double recovery exists, and the vessel owner's liability is in no way reduced by requiring the stevedore to fulfill its obligation to pay benefits under the Act. Thus requiring the stevedore to pay compensation to the injured man and perhaps not be able to recoup from the shipowner all payments made is not a form of contribution.

The question of whether the shipowner should only be responsible for that portion of the damages attributable to its fault was not advanced by any of the parties in either

Halcyon or *Hawn* and thus this Court had no occasion to consider the validity of such theories. It is an established rule that:

> (a) decision is not authority as to any questions of law which were not raised or presented to the Court and were not considered and decided by it, even though they were logically presented in the case and might have been argued, and even though such questions, if considered by the Court, would have caused a different judgment to be given.

H. Black, *Law of Judicial Precedence* 27 (1912). Thus, we submit that given the extensive changes in the LHWCA since *Halcyon* and *Hawn,* those decisions do not preclude affirmance of the *en banc* decision below.

Moreover, defendant submits that *Halcyon,* even if still viable, is inapplicable because the shipowner in the present case seeks no contribution from the plaintiff's stevedore employer.

33 U.S.C. § 905(b) provides in pertinent part that the employer "shall not be liable to the vessel for such *damages* (i.e. the damages paid an injured longshoreman by a negligent vessel owner) directly or indirectly" (emphasis added). The drafters of the 1972 Amendments to the LHWCA intended this language to eliminate the usual *Ryan* indemnity suit whereby the stevedore employer was subjected to dual liability for compensation benefits and damages. The application of a rule of proportionate fault in no way increases the stevedore's exposure or requires it to respond in damages to the shipowner or the injured worker. The stevedore's maximum exposure is limited to the amounts and schedules set forth in the Act and the stevedore is not called upon to reimburse the shipowner for any damages paid by the shipowner to the plaintiff. *See generally Smith v. Rivest,* 396 F. Supp. 379 (E.D. Wis. 1975)

Thus, the utilization of a proportionate fault concept is different from contribution since the stevedore is not to pay any more to its employee than its workmen's compensation obligation.

Contribution is basically an equitable doctrine whereby two or more parties liable in common to a third share liability. Since the stevedore is not liable to the plaintiff except by virtue of the workmen's compensation scheme, there can be no possibility of contribution. See. W. Prosser, *The Law of Torts,* § 50 at 309 (4th Ed. 1971)[11] Thus the employer under the rule of the Court below is required to do no more than he would be required to do by statute had no third-party shipowner become involved.

Moreover, careful consideration of the fundamental distinctions between damages at law and workmen's compensation payments and the effect of the 1972 Amendments to the LHWCA demonstrates that the alleged conflict between a rule of proportionate fault and the bar to contribution as developed in *Halcyon* and *Hawn* is illusory. There is a significant difference between compensation payments and the contribution forbidden by *Halcyon* and *Hawn* as well as the proscribed payment of damages under § 5(b) of the LHWCA.[12]

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[11] Judge Friendly recently defined contribution as that principle whereby:

> a tortfeasor against whom a judgment is rendered seeks to recover proportional shares of the judgment "from other joint tortfeasors whose negligence contributed to the injury and who are also liable to the plaintiff" *Zapico* v. *Bucyrus Erie Co.,* 579 F.2d 714, 718 (2nd Cir. 1978), *quoting Dawson* v. *Contractors Transport Company,* 467 F.2d 727 (D.C. Cir. 1972)

[12] The distinction between damages at law and payments occasioned by workmen's compensation acts was made by the Fourth Circuit long ago in *Crab Orchard Improvement Co.* v. *Chesapeake O. Ry. Co.,* 115 F.2d 277 (4th Cir. 1940):

> [C]ompensation from a Fund is not measured by the extent of the employee's injury; rather it is measured by the size of his

The Ninth Circuit in *Shellman* and *Dodge* and the Fifth Circuit in *Samuels* misused or misunderstood the word "damages" as used in § 905(b) and its confusion of the legislative denial of a Ryan-type indemnity to a vessel owner by a wrongdoing stevedore with the apportioning of the financial burdens of a personal injury suit in accordance with fault.

The precise language of § 5(b) is:

> ". . . and the employer [stevedore] shall not be liable to the vessel for *such damages* directly or indirectly . . . .

33 U.S.C. § 905(b) (1976) (emphasis added)

The single undisputed purpose of the language was to eliminate the former right of the vessel owner to bring a third-party action against a wrongdoing stevedore for *Ryan* indemnity—the full repayment to the vessel owner of any damages for which it was held liable, together with expenses and counsel fees—in an action brought by an injured harbor worker against the vessel owner for damages resulting from negligence or unseaworthiness. In exchange for the extinction of the vessel owner's right of indemnity from his stevedoring-employer, the injured workman was accorded vastly increased compensation benefits, while the vessel owner was

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weekly wage. Thus, instead of being an indemnity, workmen's compensation is more in the guise of a pension or an investment, and, like life and accident insurance, is not subject (in the absence of a statute or specific contractual provision) to the principle of subrogation.

Id. at 281.

The West Virginia Code which governed *Crab Orchard* had no provision for either an assignment of the empolyee's right to the employer or the right of subrogation of the insurer to the employee's rights, thus permitting a double recovery by the injured workman. Under both the LHWCA and admiralty law, such double recoveries are not permitted.

liable thereafter only for negligence. The vessel owner's liability for unseaworthiness, which formed the basis of the majority of the suits brought by injured longshoremen was eliminated. The sharing of financial responsibility in proportion to fault under the holding below calls for nothing more from a wrongdoing stevedore than it is statutorily required to pay in compensation benefits.

IV.

The Concept Of "Joint And Several Liability" Is Not Involved In This Case

Petitioner argues that by virtue of the common law doctrine of joint and several liability the shipowner should be required to pay the full amount of the damages though the stevedore's negligence may have contributed to cause the plaintiff's injuries (in the present case 70 percent). Petitioner further points to the legislative history and suggests that because there is nothing in the Senate or House Reports specifically indicating an intent to abrogate the rule of joint and several liability Congress must have desired that such a concept apply in actions brought under the 1972 Amendments to the LHWCA and thus the rule of proportionate fault contained in the decision below is somehow violative of the ancient doctrine of joint and several liability.

We submit that the concept of joint and several liability has no application in the present case and the arguments of petitioner and its supporting *amici* cannot stand close analysis. The concept of joint and several liability is discussed in its traditional terms at page 12 of Petitioner's Brief and at page 5 of the brief of the Association of Trial Lawyers of America. Under the traditional view of joint and several liability one who is injured by the wrongful act of two or

more joint tortfeasors has the option to sue each tortfeasor separately and regardless of the concurrent negligence of each respective tortfeasor recover the whole of the damages from any of the parties sued. *See* Prosser, *The Law of Torts,* § 47 (4th Ed. 1971).

However, as is correctly noted in the brief of Liberty Mutual Insurance Company a compensation-paying employer has a statutory immunity from tort liability and thus is not a "tortfeasor" nor is liability joint. (Brief of Liberty Mutual Insurance Company at 3) Thus, the doctrine of joint and several liability insofar as it only applies to situations in which you have joint tortfeasors has no application in the present circumstances. It is interesting to note that the cases referred to by Liberty Mutual are all ones in which you had true joint tortfeasors and none of the concurrently negligent parties had a statutory immunity.

Moreover, the underlying justification for the rule of joint and several liability is that the risk of insolvency on the part of one of the joint tortfeasors should be placed upon the tortfeasors themselves rather than on the innocent plaintiff. This rule is fully set forth in the recent decision of *American Motorcycle Association v. Superior Court,* 20 Cal. 3rd 578, 146 Cal. Rptr. 182, 578 P. 2d 899, 906 (1978), which is also discussed in some detail in the brief of Liberty Mutual Insurance Company. As the Court notes in *American Motorcycle* the rule of joint and several liability "recognizes that fairness dictates that the 'wronged party should not be deprived of his right to redress,' but that 'the wrongdoers should be left to work out between themselves any apportionment.' " 578 P. 2d at 906

In the present case the injured plaintiff is fully and adequately compensated for the negligence of his stevedore-employer through the very liberal compensation benefits

permitted under the LHWCA.[13] In the present case Stanley Edmonds has received statutory benefits through December 18, 1978, in the amount of $49,152.23 and he is still being paid compensation at the rate of $184.07 per week. (see brief of Liberty Mutual Insurance Company at 2) In addition Edmonds may be entitled at a later date to additional sums for permanent partial disability based on the schedules set forth in § 8(c) of the LHWCA (33 U.S.C. § 908(c)).

The foundation of the rule of joint and several liability, the protection of the injured party from the insolvency or lack of financial ability, of one of the joint tortfeasors, does not apply in the present situation since the LHWCA and the regulations provide comprehensive safeguards which insure prompt payment of all compensation benefits. 33 U.S.C. § 932; 20 C.F.R. § 703.001 *et seq.*

Moreover, a rule of proportionate fault which only holds a third-party tortfeasor responsible for its portion of the total damages is clearly fairer and more equitable than a rule such as advocated by petitioners which would impose all of the liability on the third party even where the negligence of the third party was minimal and the fault of the stevedore-employer was great. This same issue was raised before the Court below and Judge Haynsworth, in rejecting the view that the shipowner should be held accountable for more than its proportionate share of the damage, stated:

> The longshoreman, looking to the many references in the statute and its legislative history to the principles

[13] These very liberal benefits are summarized at pages 15 and 16 of the brief of the National Association of Stevedores. Under the LHWCA as it is presently written an injured longshoreman can receive ⅔ of his average weekly wage, tax free, up to a maximum of $396.78 per week. There is no maximum on the amount of disability benefits that can be received, disability benefits are escalated annually through a formula set by the Secretary of Labor and all of the injured man's medical expenses are paid in full.

> of land based negligence law, would import into those references those principles of the common law which permit full recovery by an injured plaintiff against any single joint tortfeasor but that common law doctrine is mitigated in many states by the provision of rights of contribution or of indemnity from other joint tortfeasors or has been supplanted by a system of comparative negligence. In the 1972 Amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore and it is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedores very greatly so. 577 F.2d at 1155 (Pet. App. 56)[14]

Liberty Mutual recognizes the inapplicability of concepts of joint and several liability in the context of the present case and appears to concede (Liberty Mutual brief at 3) that the issue is not joint and several liability as one would think from an initial reading of the brief of petitioner and Liberty Mutual rather it is a question of "several liability." By "several liability" Liberty Mutual apparently is referring to a concept whereby one tortfeasor, in the present case the shipowner, will be held liable for all the damages regardless of its degree of fault.

The Court below in the language quoted above properly rejected such arguments since such a conclusion would be

[14] Most states by statute or case law permit damages to be apportioned among joint tortfeasors under theories of contribution, implied indemnity and contractual indemnity. Thus the common law rule of joint and several liability has been modified considerably such that where there are true joint tortfeasors liability is apportioned between them. This form of risk sharing is also permitted in some jurisdictions where one of the negligent parties is a compensation paying employer. *Dole v. Dow Chemical Co.* 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S. 2d 382 (1972); *Skinner v. Reed-Prentice Division Package Machinery Co.;* 70 Ill.2d 1, 374 N. E.2d 437 (1978).

totally inconsistent with the language of the LHWCA and the intent of Congress. The Court below in no way abrogated the ancient doctrine of joint and several liability rather it was a recognition that in view of the language of § 905(b), the statutory compensation scheme, and traditional admiralty rules of proportionate fault such concepts are wholly inapplicable.

V.

A Rule Of Porportionate Fault Imposes No Unjustified Burden On The Injured Longshoreman

The petitioner's brief in the present case and the *amicus* brief of the American Trial Lawyers Association rely on the Ninth Circuit decisions in *Shellman* and *Dodge* and place some emphasis on the alleged fact that the application of a rule of proportionate fault will work an injustice or place an unjustifiable burden on the injured longshoreman. We submit that such an argument is without foundation and misconceives the nature of workmen's compensation and the application of the rule of proportionate fault.

In support of its assertion that a rule of proportionate fault is unfair to the longshoreman, the Ninth Circuit in *Shellman* noted:

> We therefore reject both the *Murray Credit* and *Shellman* doctrines because they are contrary to the weight of authority and because they impose unjustified burdens upon the injured longshoreman. The Second Circuit very recently considered this problem observing: "We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own negligence.

Shellman, supra, at 680, *quoting, Landon v. Leif Hoegh*

and Co., Inc., 521 F.2d 756, 763 (2nd Cir. 1975), *cert. denied* 423 U.S. 1053 (1976).

We submit that the reliance on the quoted language from *Landon* as authority for rejecting such a note is misplaced. The quoted passage from Landon stands only for the proposition that there is no need for the injured longshoreman to prove that the injury resulted from the sole negligence of the shipowner in order to recover. No injustice or inequity is worked on an injured longshoreman by the application of the rule because he has been compensated by his employer for the employer's negligence in the form of compensation payments. The longshoreman then receives, in addition, that portion of his damages which was caused by the shipowner, a sum over and above his compensation recovery. In some situations the compensation paid to the injured longshoreman will be less than the recovery he could obtain in a third-party action against his employer. This is not an inequity or unfair burden on the injured man, as the Court in *Dodge* and *Shellman* suggests, rather it is reflective of the workmen's compensation system. Prosser states in this regard that compensation statutes strike a compromise:

> by which the workman is to accept a limited compensation, usually less than the estimate which a jury might place upon his damages, in return for an extended liability of the employer, and an assurance that he will be paid. Accordingly, even though his damages are partly of a nature not compensated under the act, he has no cause of action based on the negligence of his employer.

W. Prosser, *supra* § 80 at 531-532.

The injured employee in exchange for automatic payment of compensation benefits for work-related injuries, regardless of fault, has given up the possibility of an increased, but speculative, recovery based on his employer's negligence. It

would be incorrect to criticize the Court below for creating an unjustified burden on the injured man, since by receiving damages from a negligent third-party (the shipowner) proportionate to its relative fault, the employee receives a fuller recovery without risking his right to collect workmen's compensation.

Moreover, in the present case, it must be recognized that the plaintiff, Stanley Edmonds, at present, has a continuing right to receive and is receiving compensation benefits from his employer for temporary total disability.[15]

In addition, Edmonds, if the "Equitable Credit" is applied, will not have to pay back the compensation paid to him prior to judgment (the lien). (See Discussion of the stevedores' compensation lien *infra.*) Thus, by proving that the shipowner was 20% at fault, Edmonds will receive $20,000.00 over and above what he would have received had he only been entitled to receive compensation benefits.

VI.

Decisions From Other Circuits Support Affirmance Of The Decisions Below

Petitioner and his supporting *amici* suggest that all circuits save the Court below have rejected the view that the shipowner should only be responsible for damages attributable to its fault. While we acknowledge that the Ninth Circuit's decision in *Shellman, supra,* and *Dodge, supra,* and the Fifth Circuit's decision in *Samuels* v. *Empressa Lineas Maritimas Argentanas,* 573 F.2d 884 (5th Cir. 1978), *pet for cert. pending* are contrary to the decision of the Court

[15] In addition, Edmonds, if the "Equitable Credit" is applied, will not have to pay back the compensation paid to him prior to judgment (the lien). (See Discussion of the stevedores' compensation lien *infra* at 40.) Thus, by proving that the shipowner was 20% at fault, Edmonds will receive $20,000 over and above what he would have received had he only been entitled to receive compensation benefits.

below, we have discussed previously in this brief the reasons why we feel that those cases were incorrectly decided. Decisions from the District of Columbia Circuit construing both the Federal Employees' Compensation Act and the LHWCA have approved a concept of proportionate fault similar to the rule adopted by the Court below,[16] as have decisions in the Third Circuit.

The concept of apportioning fault in situations where the concurrent negligence of a third-party tortfeasor and an employer combine to cause injury to an employee is not a novel one and such a system has been established by case law in the District of Columbia. The most significant of these decisions are *Murray* v. *United States,* 405 F. 2d 1361 (D.C. Cir. 1968) and *Dawson* v. *Contractors Transport Corp.,* 467 F. 2d 727 (D.C. Cir. 1972).

In *Murray* the plaintiff was an employee of the United States and was injured by the joint negligence of the employer and a third-party tortfeasor. Because of the exclusive remedy provisions of the Federal Employees Compensation Act (F.E.C.A.), 5 U.S.C. §8101 *et seq.,* the third-party tortfeasor could not obtain contribution from the employer. In order to prevent the inequity which would result if the third-party tortfeasor should be forced to bear the entire liability, the Court held that the injured plaintiff was only entitled to recover ½ of his damages from the third-party tortfeasor because he had in effect, "settled" with his employer by receipt of compensation benefits.

In *Dawson* v. *Contractors Transport Corp.,* a similar situation arose and the Court held that the doctrine of *Murray* was applicable to instances in which employees had received benefits under the LHWCA and the Murray doctrine was discussed at length and with approval. See also, *Perchell* v. *District of Columbia,* 444 F. 2d 997 (D.C. Cir. 1971).

[16] Since 1928 the LHWCA has been utilized as a compensation law for all non-governmental employees working in the District of Columbia.

The "Murray Credit" as the rule of the *Murray* case came to be known has been criticized in some quarters chiefly due to the fact that the third-party judgment is reduced by 50 percent regardless of the relatives degrees of fault of the parties. However, when the concept of *Murray* is combined with the traditional admiralty rule of proportionate fault as embodied in *United States* v. *Reliable Transfer Co., Inc., supra,* the system provides a fair and more equitable means of resolving cases involving concurrent negligence.

The United States Court of Appeals for the Third Circuit has also had occasion to discuss the issue of proportionate fault and, while not holding that such a system should be adopted, at least one panel of that court has discussed the issue in dictum. *Marant* v. *Farrell Lines,* 550 F. 2d 142, 147 (3rd Cir. 1977). The Court in *Marant* discusses in some detail the rule of *Murray* as it is applied in the District of Columbia and the Court notes that in view of this Court's decision in *United States* v. *Reliable Transfer* the concept of proportionate fault is a viable one.

At least one District Court in the Third Circuit has analyzed the language of Section 905(b) in the same fashion as the *en banc* decision below and reached the conclusion that a shipowner need only pay that portion of the damages which it has caused. *Griffith* v. *Wheeling-Pittsburgh Steel Corp., supra.* The Court in *Wheeling* stated:

> "Any construction of 905(b) other than one embodying comparative negligence would result in an employee of an independent stevedore recovering full damages from a negligent vessel no matter how little negligent the vessel may have been." 452 F. Supp. at 847.

The Court went on to refer to the rule advocated by respondent and *amicus* American Export Lines, Inc. et al. (The Equitable Credit) in the following terms:

> The Equitable Credit Doctrine is a method of damage allocation which fosters fairness through the vehicle of proportionate fault. *Id.*

VII.

The Stevedore Is Not Entitled To Reimbursement Of Its Compensation Lien

A. Neither The Statute Nor Equitable Considerations Require Full Lien Reimbursement

Petitioner and his supporting *amicus* Liberty Mutual Insurance Company assume in their briefs that Liberty Mutual would be entitled to payment of the entire $20,000 judgment if the decision of the Court below is affirmed. This argument is used to imply that the longshoreman is therefore the one who bears the brunt of the loss and not the shipowner or the stevedore whose joint fault brought about the accident.

The Court below did not say this and, in fact, expressly did not rule on the distribution of the $20,000 judgment but left this to a later determination by the District Court.

The stevedore's right to seek repayment of the compensation is based upon the *equitable* doctrine of subrogation, whereby the stevedoring company has a lien upon the award. See *The Etna,* 138 F(2d) 37 (3rd Cir. 1943); *Fontana* v. *Pennsylvania R. Co.,* 106 F.Supp. 461 (SDNY 1952). *The Etna,* however, does not require that the stevedore recover its lien under all circumstances. The Court, in *The Etna,* held that the stevedoring company, under equitable principles, was entitled to subrogation, "where one, not acting

officiously, pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily respossible." 138 F(2d) at 39. This language can only be taken to mean that where the injured party received full damages from a negligent third party, the stevedore is entitled to recover its lien. Nowhere in the Court's opinion is there any indication that the same result would be reached in a situation where both the third party and the stevedoring company were held negligent. In fact, the ruling seems to be limited to the particular facts of that case.

The Court in *The Etna* relied principally on Section 162 of the Restatement of Restitution which states that where one person discharges an obligation "owed by another" he is entitled to be subrogated to the position of that person against the one causing the damage. Section 162 of the Restatement and the comments thereto indicate that the subrogation remedy is designed to avoid unjust enrichment and that the remedy is one which is based on principles of equity.

Thus it is clear that the Court in *The Etna,* based its ruling on equitable principles. In holding that where a longshoreman recovers full damages from a negligent third party, the stevedore is entitled to recover its full lien, the Court was obviously seeking, under equitable principles, to prevent a double recovery by the longshoreman, and to reimburse the stevedore for its compensation exposure when the accident was caused by the fault of a third party.

Since equitable principles govern the stevedore's right to subrogation, each case must be determined according to its own facts. It would be patently inequitable for a stevedoring company, which is found to be 70% at fault, to recover its entire compensation lien and thus to escape all liability for the accident. Similarly, it would be equally unfair here for a stevedoring company found to be 70% at fault for an accident to recover the full amount of the judgment in reim-

bursement of its lien. Such a result would fly in the face of the purpose of the subrogation remedy as set out in *The Etna* and Restatement of Restitution, Section 162, which is to avoid unjust enrichment.

Such an inequity was discussed in some detail in *Croshaw* v. *Koninklyke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975) when the Court noted that it would violate the "fundamental policies of equity" for the stevedore to profit from its own negligent conduct by recovering its equitable lien, even where the stevedore is negligent, for:

> There is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence. If his lien is to be truly equitable it must be diminished according to that negligence. 398 F. Supp. at 1234.

Courts in various jurisdictions have denied full subrogation where there was evidence of employer's negligence. *E.g., Brown* v. *Southern Ry.* 204 N.C. 668, 169 S.E. 419 (1933); *Witt* v. *Jackson,* 57 Cal 2d 57, 366 P. 2d 641 (1961). In *Brown,* the Supreme Court of North Carolina stated the rule in graphic terms as follows: "[H]is [the employer's] hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law." 169 S.E. at 420.

It has also been suggested that Section 933 of the LHWCA, which operates to assign the longshoreman's cause of action to the stevedore employer under certain circumstances, requires full repayment of the lien in all instances.

We submit that an analysis of Section 933 and the legislative history relating to that section demonstrates that such a concern is unfounded.

The present Section 933[17] was added to LHWCA in 1959. Prior to the 1959 Amendments to Section 33, the injured longshoreman was required to elect whether to collect compensation or to pursue a third-party suit against the shipowner. The injured employee was not allowed to pursue both courses of action and he could not obtain an adjudication of the amount of workman's compensation due him so long as his third-party claim was pending. Thus, in the event an injured longshoreman sought to recover damages in a third-party suit, he was required to forego his right to receive compensation until such time as the third-party suit for damages had been concluded. The legislative history of the 1959 Amendments, S. Rep. No. 428, 86th Congress, 1st Sess., [1959] *U.S. Code, Cong. & Ad. News,* 2134, indicates very clearly that the purpose of the bill was not to vest additional rights in the employer but rather was to aid the injured worker. In amending the statute so as to permit the employee to receive compensation benefits under the Act and also to recover damages for the same injury in a third-party suit, the committee recognized that steps must be taken

[17] Section 933 of the Act provides in pertinent part:

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such persons shall commence an action against such third person within six months after such award.

* * *

(h) Where the employer is insured and the insurance carrier assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

* * *

in order to prevent the employee from receiving double compensation and this is why the statute as amended provided for the employer to be reimbursed for compensation paid to the employee in certain instances.

There is nothing in the language of Sec. 33 or the legislative history which indicates that Congress intended that the employer's right to recover the amount of its compensation paid should be absolute and not subject to either legal or equitable defenses. It is apparent that the only concern on the part of Congress, in providing a means by which the stevedore should recoup its lien, was the desire to prevent double recovery by the injured worker.

Moreover, it should be noted that Sec. 933(b) provides that acceptance of compensation under an award operates as an "assignment" to the employer of the injured longshoreman's right to recover damages against a third-party should the longshoreman not bring an action within six (6) months after an award. Thus, the statute permits the employer to pursue a claim against an allegedly negligent third-party in its own name or where compensation has been paid by an insurer, the insurer is permitted to bring the suit in its own right. Where an action is brought by the employer under Sec. 933 against the shipowner, the defense of the stevedore's contributory fault is available to shipowner, and we submit it may operate either to bar or reduce the stevedore's recovery. See *Fireman's Fund Indemnity Co.* v. *United States,* 110 F. Supp. 937 (N.D. Fla. 1953), *aff'd,* 211 F.2d 773 (5th Cir. 1954); *see also American Casualty Company* v. *South Carolina Gas Company,* 124 F.Supp. 30 (W.D.S.C. 1954).

It would be somewhat anomalous to require reimbursement of the compensation lien to the stevedore under the circumstances of the present case where the stevedore has been found to be 70% at fault when the stevedore would

not be entitled to recover back its payments in the event it had brought the action, in its own right, against the shipowner.

Under the facts of this case, a denial of repayment of compensation paid to the stevedore treats all parties fairly and equitably. The shipowner pays its proportionate share of the damages—20% of the total award. The injured longshoreman recovers from the vessel damages based on its proportionate fault ($20,000) and in addition retains all compensation paid by his employer, which in this case amounts to $49,152.23 as of December 18, 1978. Finally the stevedoring company, the party most at fault, still pays no more than its statutory obligation under the LHWCA, and in fact would receive a credit of $20,000 (amount of judgment) against payment of further compensation.

B. The "Equitable Credit"—A Means For Dealing Fairly With The Lien Question

A logical means of handling the problem of the stevedore's lien in cases involving concurrent fault of shipowner and stevedore was suggested in a well reasoned law review article authored by Daniel J. Dougherty and Joseph Cohen entitled. *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587 (1974). In this article the authors discuss both the mechanics of what has come to be known as the "Equitable Credit" as well as the legal and policy reasons favoring its adoption.[18]

[18] Cohen and Dougherty describe the mechanics of the credit as follows:

> If the employer was a joint tortfeasor, it could be impleaded or otherwise bound by the third party. However, in such a case, the actual dollar liability of the employer should not exceed the amount of the employer's dollar liability in compensation. Just

In the present case the jury returned a total damage award of $100,000 and found that the shipowner was 20% at fault, the stevedore was 70% at fault and the plaintiff was 10% at fault. Under the "Equitable Credit" formula, the plaintiff's recovery would be reduced by 80% (70% fault of stevedore plus 10% contributory fault of plaintiff) and he would be entitled to recover 20% of the total damages from the shipowner ($20,000). However, because the stevedore was 70% at fault for the accident, the plaintiff would not be required to repay the stevedore's compensation lien or any part of it ($49,152.23 as of December 18, 1978).

Numerous examples showing the mechanics of the application of the "Equitable Credit" in various situations are

---

as every employee will be guaranteed *minimum* benefits of workmen's compensation, so will every employer be guaranteed a maximum liability of compensation benefits, whether directly or indirectly, for any employee's industrial accident.

The proportional amount of any employer's fault is to go in mitigation of the third party's damages, in the same fashion as the employee's contributory negligence, so that the third party actually responds to the employee only for that amount of the employee's damages as is equal to the third party's proportion of the fault.

From any recovery the employee obtains from the third party, the employee is to reimburse the employer for the compensation benefits paid. However, if any employer negligence resulted in a diminution or reduction of the employee's recovery against the third party, the employee may deduct and retain that amount from the compensation benefits to be reimbursed.

Thus, if the damages attributable to the employer's fault were less than the amount of the compensation benefits the employer would recover only the difference between the amount of the compensation benefits and the amount by which its fault reduced the employee's recovery. If the employer's fault were in excess of the compensation benefits, it would not receive any reimbursement, but neither would it be liable for any excess. In such situation the loss to the employee is the consideration for the absolute right to compensation benefits regardless of fault. *Cohen and Dougherty, supra* at 606.

contained in *Coleman and Daly, supra.* The credit concept is also discussed with approval in an article by J. R. Shorter entitled *In the Wake of the 1972 Amendments to the LHWCA: The Vessel's Rights Against the Stevedore,* 7 J. Mar. L. & Comm. (1976).

A rule for the handling of the stevedore's lien as advocated herein is entirely consistent with the policy of porportionate fault in maritime cases as set forth by this Court in *United States* v. *Reliable Transfer, supra,* since it provides for a sharing of the financial burden of an injury producing accident by all parties shown to be at fault.

Similarly, such a rule would tend to promote safety in the industry, one of the principle concerns of Congress in adopting the 1972 Amendments. The legislative history of the Amendments demonstrates the concern on the part of Congress about the high accident rates in the longshoring industry and the LHWCA was seen as a means of providing an incentive for the stevedore employer to improve working conditions and promote safety. The Senate Report provides in part:

> ". . . assuring that the employer bears the cost of unsafe conditions, [will] serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.
>
> This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry. . . ."

S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 2 (1972).

If the stevedore employer is permitted to recover its compensation lien in all cases where there is some fault on the part of the vessel, regardless of its own fault, then there is little financial incentive for the stevedore to promote safety and prevent accidents. The handling of the lien as advocated by the shipowner herein will provide the necessary incentive by barring reimbursement of a portion of the compensation lien where the evidence demonstrates negligence on the part of the employer.

It should also be noted that the stevedore's lien often has a substantial impact on the settlement of cases both before and after the institution of litigation. In many third-party claims brought against a vessel, some fault on the part of the stevedore has contributed to the accident and in such cases it often is very difficult, given the presence of the stevedore's lien, for the shipowner and the injured longshoreman to settle the third-party claim. This is particularly true in cases where the negligence on the part of the vessel is questionable, the fault of the stevedore is substantial and because of serious injuries to the plaintiff the compensation lien is high. Under such circumstances the case will always be tried unless the stevedore is willing to waive repayment of a portion of its lien; however, there is little incentive for the stevedore to take such a step in the absence of some system such a shipowner advocates here which would deny the stevedore reimbursement of at least a portion of its lien where negligence of the stevedore has contributed to the plaintiff's injuries.

It is only when the stevedore is required to assume a portion of the financial responsibility where its fault has contributed to the accident that fair settlement among all interested parties can be accomplished and needless, expensive litigation can be avoided. A denial of reimbursement of the lien when the stevedore is concurrently at fault for the accident provides the fairest method of accomplishing this result

and is in keeping with the intent of Congress in enacting the 1972 Amendments of the LHWCA.

The desirability of requiring all parties at fault to share equitably in the financial burdens of compensating an injured longshoreman for his injuries was expressed succinctly by the Third Circuit in *Marant, supra* wherein the Court stated:

> The concurring opinion expresses concern that any credit or apportionment rule would lead to increased litigation and that, even "if" the present rule is unfair, change should come from Congress. This court being already inundated with LHWCA litigation to interpret the 1972 amendments, it is difficult—though concededly frightening—to imagine an increase. It would seem as likely, however, that a rule which equitably apportioned liability according to fault might decrease litigation and promote settlement, especially by removing the incentive of a large judgment against a shipowner who is only partly at fault. As the Supreme Court has recently observed: "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *Marant, supra* at 147, *quoting, Reliable Transfer, supra* at 408.

We submit that a rule of proportionate fault such as that advocated here will tend to promote out-of-court settlements and will ease the congestion in the federal courts which concerned Congress when it enacted the 1972 Amendments. *See* H. R. Rep. No. 92-1441, 92nd Cong. 2d Sess., [1972] *U.S. Cong. & Ad. News* 4698, 4702 (1972).

VIII.

A Rule Of Proportionate Fault Will Not Unduly Burden The Stevedore Or Constitute A Return To Tripartite Litigation

The stevedore argues that in return for the vastly increased compensation benefits it would be required to pay under the 1972 Amendments it was relieved of *Ryan* type liability to the shipowner and that if its right to recover its equitable lien is forfeited, one of the principle purposes of the amendments has been thwarted—that is, to preserve the resources of the stevedores and their carriers in order to insure that the compensation payments can be met.

It should be remembered, however, that the ultimate burden of the increased cost of compensation is borne by the shipowner. The stevedoring charges paid by the shipowner include all expenses of the stevedore and obviously include premiums for workmen's compensation insurance. It is clear, therefore, that the vastly increased cost of providing compensation benefits to longshoremen is passed along to the shipowner as one of the items included in the charge for stevedoring. The fact that the shipowner ultimately bears the cost of the increased compensation benefits was discussed during the Congressional hearings on the 1972 Amendments as well as at the oversight hearings subsequent to the amendments.[19]

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[19] Francis A. Scanlan, discussed the question of compensation premiums in testimony on the proposed 1972 amendments given before the Senate Subcommittee on Labor on behalf of the National Maritime Compensation Committee, as follows:

> "Now, this was the single most expensive item of doing business, outside of direct labor costs. And it is a tremendous cost which must be included in the stevedore's rates that are paid by the shipowners; because ultimately, the shipowner in this case must pay the bill; and he in turn, of course, will pass it on to the shippers and consignees, who use his services."

Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on

Thus, in this case, if the plaintiff's full award is restored, the shipowner will have in effect been required to pay for the compensation benefits paid to Edmonds twice, since it not only paid the insurance premiums as part of the stevedoring charges, but would be required to repay the carrier's entire lien. This would represent a double recovery to the carrier and a double penalty to the shipowner.

The limitation of the shipowner's liability to its proportionate fault and the denial of the repayment of the stevedore's lien results in the fair sharing of the financial burden occasioned by the accident.

The suggestion is made by petitioner that affirmance of the decision below limiting a shipowner's liability to its proportionate fault will result in a return to the tripartite litigation which the 1972 amendments sought to abolish.

No such result will follow. It is clear that both the longshoreman and his employer have identical interests vis-a-vis the shipowner. The longshoreman's interest lies in showing that his injuries were proximately caused in whole by negligence of the shipowner and not by any negligence of his employer, while the employer is also interested in disproving its fault, thus preserving the right to recover its entire lien. The interest of the two are thus identical and there would be no reason for the employer to intervene in the litigation.

Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 261 (1972).

At the oversight hearings, Albert P. Kelley, Jr., Treasurer of John T. Clark & Son, a stevedore employer, testified:

> "The ships are bearing sufficient burden of costs when we have to pass on our insurance rates."

Oversight hearings on the Longshoremen's and Harbor Worker's Compensation Act (Part 1) before the Sub-comm. on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) at p. 441.

In this regard see the decision of the Ninth Circuit in *Olivas v. United States,* 506 F.2d 1158 (9th Cir. 1974).

While the employer does, under the provisions of Rule 24 of the Federal Rules of Civil Procedure, have the right to intervene to assert its equitable lien, there is no reason to do so unless it wishes to avoid payment of an attorney's fee to the longshoreman's counsel. The Courts of Appeals in the Second, Fourth and Fifth Circuits have held that an employer is obligated to pay to plaintiff's counsel a fee for recovery of its lien. *Valentino* v. *Rickners Rhederi, G.M.B.H.*, 552 F.2d 466 (2 Cir. 1977); *Swift* v. *Bolten,* 517 F.2d 368 (4th Cir. 1975); *Mitchell* v. *Scheepvaart Maatschappij Trans-Ocean,* 579 F.2d 1274 (5th Cir. 1978).[20] The effect of these decisions is that the plaintiff and his employer share proportionately in the fee paid to counsel. This further confirms the unity of purpose and interest between the longshoreman and his employer in this type of litigation and the lack of any reason for intervention by the employer.

We submit, therefore, that affirmance of the rule adopted by the Court below will in no-way encourage tripartite litigation.

[20] For a contrary ruling see the decision of the First Circuit in *Cella v. Partenreederei MS RAVENNA,* 529 F.2d 15 (1st Cir. 1975).

CONCLUSION

For the foregoing reasons, the decision of the Court below limiting the liability of the shipowner to its proportionate fault should be affirmed. To hold otherwise would perpetuate a rule which is manifestly unjust and out of step with the traditional admiralty precepts of fairness and equity.[21]

Respectfully submitted,

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[21] The recent case of *Trevellick v. Flota Mercante Grancolumbiana, S.A.* (N.D. Calif. C-77-1604-WHO January 19, 1979) is an excellent example of the inequity inherent in the position taken by petitioner. In that case a jury returned a verdict for plaintiff in the amount of $167,000, but held that the plaintiff's negligence contributed 70% to the accident, the stevedore's negligence 29% and the shipowner's negligence only 1% to the accident. Should petitioner's position be accepted, the shipowner, whose fault was found to be only 1%, would be required to pay 30% of the damages assessed, or a total of $50,000 (full judgment less contributory negligence of the plaintiff). Such a result is totally at odds with any concept of fairness and equity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief were mailed, postage prepaid, to C. Arthur Rutter, Jr., Esquire, and Calvin W. Breit, Esquire, Messrs. Breit, Rutter & Montagna, 720 Atlantic National Bank Building, 415 St. Paul's Boulevard, Norfolk, Virginia 23510, attorneys for the Petitioner; to David R. Owen, Esquire, Messrs. Semmes, Bowen & Semmes, 10 Light Street, 11th Floor, Baltimore, Maryland 22102, attorney for Liberty Mutual Insurance Company, *amicus curiae;* to Paul S. Edelman, Esquire, Messrs, Kreindler & Kreindler, 99 Park Avenue, New York, New York 10016, attorney for American Trial Lawyers Association, *amicus curiae;* Thomas D. Wilcox, Esquire, 919 Eighteenth Street, N.W., Washington, D.C. 20006, attorney for National Association of Stevedores, *amicus curiae;* to Graydon S. Staring, Esquire, Messrs. Lillick, McHose & Charles, Two Embarcadero Center, San Francisco, California 94111, attorney for Pacific Merchants Shipping Association, *amicus curiae,* and to Randall C. Coleman, Esquire, Messrs. Ober, Grimes & Shriver, 1600 Maryland National Bank Building, Baltimore, Maryland 21202, attorney for American Export Lines, et als, *amici curiae,* this 31st day of January, 1979.

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FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Summary of Argument 1

Argument:

I. Congressional Intent 4
II. The Court Should Not Hold Itself Free To Act 10
III. Joint And Several Liability 13
IV. Equitable Credit 16
V. The Burden Of Proportionate Fault Falls On The Longshoreman 20
VI. The Stevedore's Lien is Recoverable In Full . 21

Conclusion 23
Certificate of Service 26

TABLE OF CITATIONS

Cases	Page
Cella v. Partenreederei M.S. Ravenna, 529 F2d 15	9
Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974)	20
Director, Office of Workmen's Compensation Programs, United States Department of Labor v. Rasmussen, 47 U.S.L.W. 4159, (decided February 21, 1979)	12, 13
Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975) cert. denied, 425 U.S. 944 (1976)	8
Griswold v. Conn., 381 U.S. 479, 482 (1965)	16
Halcyon Lines v. Haenn Ship Ceiling and Repairing Corp., 342 U.S. 382 (1952)	2, 5, 8, 11, 19, 20
Hard v. Krawill Mach., 359 U.S. 297 (1959)	12
Landon v. Leif Hoegh & Co., Inc. 521 F2d 756 (1975)	8
Lucas v. "Brinkness" Schiffahrts GES., 374 F. Supp. 759, (E.D. Pa. 1974)	8
Mobile Oil Corporation v. Higginbotham, 1978 A.M.C. 1059 (June 5, 1978)	11
Moragne v. State Marine Lines Inc., 398 U.S. 375 (1970)	12
Nacirema Operating Co. v. Dostiny, 456 F2d 956	21
Northeast Marine Terminal Company, Inc. v. Caputo 432 U.S.C. 49, 53 L.Ed. 2d 320, 97 S.Ct. 804 (1977)	8
Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953)	5
Reed v. S.S. Yaka, 373 U.S. 410 (1963)	1, 5, 6, 7
Ryan Stevedoring Co. v. Pan Atlantic S.S. Crp., 350 U.S. 124 (1956)	5
Samuels v. Empressa Lineas Maritimas Argentinas, 573 F2d 884 (1978)	9
Sea-land Services v. Gaudet, 414 U.S. 573 (1974)	12
Seas Shipping v. Sieracki, 328 U.S. 25 (1946)	5, 18
Seas Shipping v. Sieracki, 328 U.S. 25 (1946)	5, 18
Seattle First National Bank v. Shoreline Concrete Company 588 P. 2d. 1308 (decided December 28, 1978)	13
Shellman v. United States Lines, Inc. 528 F2d 675 (9th Cir. 1975)., cert. denied, 425 U.S. 936 (1976)	8, 9
The Schooner Catherine v. Dickinson, 17 H.O.W. 170, L.E. 233 (1855)	4
United States v. Barnes, 222 U.S. 513, 32 S. Ct.117 56 L.Ed. 291 (1911)	12
United States v. Reliable Transfer, 421 U.S. 397 (1977)	2, 10, 11, 16, 17
Voris v. Eikel, 346 U.S. 328 (1953)	7
Voris v. Gulf Tire Stevedores, 211 F2d 549	21
Zapico v. Bucyrus Erie Co., 579 F2d 714	9

Articles	Pages
Kosanin, Cargo Rights and Responsibilities in Collision Case, 51 Tulane L. Rev. 880 (1977)	11
Owens, *The Origins and Developments of Marine Collision Law*, 51. Tulane L. Rev. 759, 804 (1977)	11
Schwartz, Comparative Negligence, Paragraph 16.4 at Page 253	14
Steinberg, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence actions by Longshoremen against shipowners - a Proposed Solution* 37 Ohio St. L.J. 767 (1976)	25
Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen and Harbor Workers Compensation Act*, 41 Ins. Counsel J. 63, 66 (1974)	7, 8

IN THE SUPREME COURT
OF THE
UNITED STATES

No. 78-479

STANLEY D. EDMONDS, Petitioner,

v.

COMPAGNIE GENERAL
TRANSATLANTIQUE, Respondent.

REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

In Section 905 of the amended LHWCA, Congress retained the rule that a longshoreman could recover his full damages from a vessel owner. That section also retained a longshoreman's right to sue his employer where the employer was a ship owner pro hac vice, as in Reed v. Yaka, 373 U.S. 410 (1963). Negligence of an independent party will not impose liability on the ship owner. The statute however does not adopt proportionate fault.

Halcyon Lines v. Haenn Ship Ceiling and Repairing Corp., 342 U.S. 382 (1952) remains good law even after the 1972 Amendments. Congress could easily have said otherwise if it meant to change Halcyon.

Although United States v. Reliable Transfer, 421 U.S. 397 (1977) changed the rule of division of damages in collision cases, the court there was not construing legislation but was dealing with a doctrine created by the courts. Where Congress has acted, the Court has repeatedly recognized it was not free to act to rewrite the statute. A remedial statute such as the Longshoremen's Act should not be restricted by judicial interpretation.

A single tort feasor is responsible for all the damages which his conduct proximately causes. Where two tort feasors have acted to cause an indivisible harm, both are responsible for making full compensation for the harm they have caused. This concept of joint and several liability survives under comparative negligence schemes. The doctrine of contribution among tort feasors is not used to restrict the injuried party's right to full compensation. Where land based law is to provide the basis for third party liability, the common law doctrine must continue and the injured person be permitted full recovery.

"Equitable Credit" is a misnomer where it is used to describe the reduction of an individual's right to recovery. The Act creates an equitable credit by holding the vessel liable only for negligence. But it is no equity to require the longshoreman to give up not only his unseaworthiness remedy (by statute),

but also his right to full damages under the negligence remedy (by judicial interpretation.).

The longshoreman has already given up the right to sue his employer in return for the assurance of compensation benefits. But where third party negligence is present, the longshoreman can recover his lost wages not repaid through compensation and his other full damages from the negligent party. To revise the longshoreman's rights judicially and reduce his right to damages without any corresponding benefit from the vessel places the added economic burden on the longshoreman, something nowhere required by Congress.

The stevedore's lien should be repaid in full rather than requiring the stevedore to litigate his right to recover the lien in every case. Congress, in the legislative process, required the stevedore to pay higher compensation benefits, but saved him the expense of litigation and protected the lien where third parties were negligent. Congress should make any changes in that scheme which may be deemed proper.

ARGUMENT

I. Congressional Intent.

Much ado has been made by Respondent about an apparent, but illusory, discrepancy between the first and second sentences in 33 U.S.C. 905 (b) as amended. By a strained and contrived literal reading of the words, Respondent reconciles the sentences as permitting only apportionment of damage. When read in the light of case law preceding the amendment and the legislative history, it becomes clear that Congress was not suggesting an apportionment of damages as outlined in the Fourth Circuit's opinion, rather the sentences refer to different factual situations. Read in that light, they are mere semantic distinctions without a conflict. The amendments were adopted prior to this Court's decision in Reliable Transfer. In 1972, when the applicable amendments were adopted, proportionate fault was not the general rule in maritime matters. The rule instead was one of equal liability (50-50) as between the wrongdoers, and that had been the rule for more than a century. The Schooner Catherine v. Dickinson, 17 H.O.W. 170, L.E. 233 (1855). The rule applied to collision losses but had never extended to non-collision matters. It would follow in the absence of a specific statutory undertaking or Congressional expression,

that Congress had considered, if anything a fifty/fifty (50-50) division and nothing more. Apportionment of loss in pro rata relation to degree of fault was a doctrine whose time had not yet come when the amendments were debated. But, the statutory language contains nothing to suggest that the Congress even considered such a proposal, much less adopted it. At the time of the amendments, Seas Shipping v. Sieracki, 328 U.S. 25 (1946) provided the injured longshoreman a cause of action against the shipowner for an unseaworthy condition unrelated to negligence, a strict liability in tort. Damages were recoverable to the full extent of his injury. Halcyon and Pope and Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) prohibited a claim over by shipowner against the stevedore for contribution. Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956) under a theory of implied contract rather than tort, effectively negated the consequences of Halcyon and Pope and Talbot, while carefully preserving the rule of law therein enunciated by this Court. At the same time Reed v. S.S. Yaka, Supra was alive and well and its rule was clear: while the LHWCA prohibited an action of the longshoreman employee against the employer as a stevedore, the action was permissible against his employer as a bare boat charterer, a shipowner pro hac vice. As this Court expressed in Reed, "In interpreting the Act the Court cannot now consider the wording of the statute alone. It must view it in the light of prior cases in this area, the holdings of which have been left unchanged by Congress." Id., at page 414.

With this historical background, we are faced with the inescapable conclusion that Congress, by

its 905(b) amendment had considered and expressly retained that portion of Reed which permitted an action against the stevedore-employer as a shipowner, but only lying in tort, and rejected that portion which followed Sieracki as well as Sieracki itself, i.e. the cause of action for an unseaworthy condition. Further, it becomes clear that congress in the amendments intended to abrogate the rule in Ryan which created the circular litigation, when it declared no contractual relationship implied or expressed, direct or indirect, could require contribution from the stevedore employer. All else Congress left unchanged.

The first sentence of 905(b) refers to any person covered under the act regardless of whence his employment came. The second sentence is limited to those cases where the injured person was employed by the vessel to provide stevedoring services. If "employed by the vessel" means that the injured longshoreman was actually an employee under a contract of employment of the shipowner, then it becomes clear that this sentence was intended to be limited only to a Yaka situation. Only if construction of that phrase "employed by the vessel" is strained to mean "working aboard the vessel" although employed by an independent contractor, could this sentence have any meaning other than in relation to Yaka. If it were so intended then, of course, there would be no need for the presence of the sentence in any event, because if the injured longshoreman is injured due to the negligence of an independent contractor retained by the shipowner, at common law the shipowner would have no vicarious liability resulting from such

negligence. Even before the amendments the injured longshoreman was not entitled to recover against the shipowner under the theory of negligence, solely because of the negligence of the third party independent stevedore. His recovery from the shipowner was founded either on shipowner negligence unrelated to the stevedore's or in "unseaworthiness" rather than negligence. Vicarious laibility for negligence does not fall upon the shipowner as the result of negligence of an independent party.

Inartfully drawn as the amendment may appear to shipowner here, any contrary finding is an inscrutable stretching and misinterpretation of the literal wording, an inapplicable linguistic analysis without regard to congressional intent applied contrary to this Court's oft stated view that the Longshoremen's Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. Voris v. Eikel, 346 U.S. 328, 333, 98 L.E.D. 5, 10, 75 S.Ct. 88 (1953), Reed v. S.S. Yaka, supra.

Had Congress sought to reject the rule of Halcyon, a simple expression in the amendment would have accomplished this. Judge Haynesworth (Fourth Circuit) has misread into the second sentence of 33 U.S.C. 905(b) as amended, an intention to do so by substitution of a rule of proportionate fault when in fact the sentence's only purpose was to preserve Reed v. Yaka.

Judge Haynesworth cited Vickery, Some

Impacts of the 1972 Amendments to the Longshoreman and Harbor Workers Compensation Act, 41 Ins. Counsel J. 63, 66 (1974) for the proposition that the language of the house report strongly suggests an intention that the vessel be responsible for its proportionate part of any negligence when there is also fault on the part of the others. But nowhere is the term "proportionate fault" used in either the Act or the Congressional History. It is interesting to note that this Court has considered that very article in Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S.C. 49, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977), interpreting the act on a point not here pertinent, and discounted the result expressed in the article for the self same reason.

Halcyon deferred to Congress any change in the rule of the common law on facts identical to those here. The Congress made clear by its specific reformation of Ryan and Sieracki, that it did not intend thereby to abrogate Halcyon, a dissolution which this Court said in Halcyon, should come from Congress.

The Second Circuit, in Landon v. Leif Hoegh & Co., Inc., 521 F2d 756 (1975), called upon to consider the issue, found Halcyon to be the post amendment law. In an excellent and well reasoned opinion, Lucas v. "Brinkness" Schiffahrts G.E.S., 374 F. Supp. 759, (E.D. Pa. 1974) District Judge Huyett, made a thorough review of the history of the legislation and concluded in accord; as did the Ninth Circuit in Dodge v. Mitsui Shintaku Ginko K.K., 528 F2d 669 (1975) cert. denied, 425 U.S. 944 (1976) and Shellman v. United States Lines, Inc., 528 F2d 675

(9th Cir. 1975)., cert. denied, 425 U.S. 936 (1976), the Fifth Circuit in Samuels v. Empressa Lineas Maritimas Argentinas, 573 F2d 884 (1978) and multiple other cases cited in the original Brief for the Petitioner (P.P. 25 and 26 orig. Brief for Petitioner); the First Circuit by suggestion in Cella v. Partenreederei M.S. Ravenna, 529 F2d 15; and again the Second Circuit in Zapico v. Bucyrus Erie Co., 579 F2d 714.

While Congress intended to free the shipowner of liability without fault in exchange for an increased compensation rate to the employee, it did not propose to destroy all other types of recovery. It remained for the employee to recover fully for a tort inflicted injury. Congress was concerned about the vessel owners' laxity in preventing injuries to longshoremen and therefore justly retained a cause of action against them in the event of their negligence. It becomes Congress' duty to do so, if it desires to proportion fault in derogation of the common law, and the present expressed statutory intent, not the duty of the Courts.

The issues involved here are of considerable importance to the maritime industry (Respondents Brief in Reply to Petition for Writ of Certiorari, Page 1) The multiplicity of amici briefs from every phase of industry and labor suggest to the Court the economic importance of the issue. It was as important during deliberations on the amendments as it is now. Had any intention existed on the part of Congress to reduce the award of the injured employee by other than his own negligence, no amount of incompetent draftsmanship could have

prevented it from being written into law with a simple phrase or clause — not even a sentence.

II. The Court Should Not Hold Itself Free to Act.

It is secondly argued that even if the shipowner is incorrect that Congress intended a system of proportionate fault, at least it was silent on the matter and therefore the Courts are free to act in that arena. Great comfort is taken in this Court's holding in Reliable transfer on that issue. Reliable, however, did not create a new theory of proportionate fault, nor is it related to the issue at hand. Reliable merely revised a common law theory of division of fault in collision matters by changing the percentages as between the two injured parties at fault more in keeping with their actual degree of fault. The Court was construing not legislation by Congress but a common law doctrine 120 years or more in being, created by the Courts and emerging from English maritime law from before the Magna Carta. The Court maintained the basic theory of divided damages, but recognized the potential unfairness between two parties jointly negligent, though in different degrees. The longstanding principle of divided damages remained, but the division became relative to fault, not equal.

Reliable Transfer then did nothing to the law of contribution. The sharing of collision damages between two ships at fault is a means of reallocating the damages all ready suffered by both in proportion to the fault of each; it is not passing of an outsider victim's judgment from one unhurt tort feasor to the

other. This Court in Halcyon was called upon then to overturn a rule of common law and deferred to Congress because Congress had enacted so much legislation in the area of maritime personal injuries. This Court did likewise in Mobile Oil Corporation v. Higginbotham, 1978 A.M.C. 1059 (June 5, 1978), when the Court deferred to Congress which had undertaken to cover the field of death on the high seas. Reliable Transfer, on the other hand, was dealing with a common law rule in which Congress had made no attempt to legislate.

Reliable did not change the law relative to the duties of both ships to an injured third party, nor did it change the law relative to cargo's rights to full recovery from the non-carrying vessel. It is significant that the Government argued in Reliable that cargo is entitled to the full recovery notwithstanding the proportionate fault set forth in the decision. See: Owens, *The Origins and Developments of Marine Collision Law*, 51 Tulane L. Rev. 759, 804 (1977); Kosanin, *Cargo Rights and Responsibilities in Collision Case*, 51 Tulane L. Rev. 880 (1977).

Further, Reliable is unrelated to the issue here. It speaks to the premise of two negligent parties with liquidated damages and the extent of liability, one to the other; not to the issue of a third party whose injury is caused jointly by the two. A different rule of law evokes there, as well it should.

Counsel for Respondent argues that absent specific legislation to the contrary, the Court should adopt a rule reducing the damages to which an

injured employee was heretofore entitled. Citing Moragne v. State Marine Lines, Inc. 398 U.S. 375 (1970) and Sea-land Services v. Gaudet 414 U.S. 573 (1974) both of which extended and enlarged the rights of the individual and his family to seek redress, counsel relies on them now to reduce those rights. The shipowner argues this, while conceding that the Act should be liberally construed. Because Congress failed to spell out explicitly that it was not adopting a rule of reduced damages, the shipowner argues that such a rule should be adopted. The contrary, however, is more correct. The proper rule of logic and statutory construction is that unless a statute provides for the abrogation of a settled principle of law, particularly one which provides rights and remedies of person over property, that principle of law remains in force. The statute must be construed strictly in light of the claim of shipowner that it is intended to limit common law rights of the injury workman. See Robert C. Hard v. Krawill Mach., 359 U.S. 297 (1959).

As Mr. Justice VanDeventer wrote in the United States v. Barnes, 222 U.S. 513, 32 S. Ct. 117, 56 L.Ed. 291 (1911),

> "Where there is subsequent legislation on a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears."

As this Court states, writing through Mr. Justice Rehnquist in Director, Office of Workmen's Compensation Programs, United States

Department of Labor v. Rasmussen, 47 U.S.L.W. 4159 (decided February 21, 1979) wherein the Court was reviewing disability and death benefit provisions of the Longshoremen and Harbor Workers Compensation Act Amendments of 1972, "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a line.' Our task is to interpret what Congress has said;—"

III. Joint and Several Liability

It is contended that joint and several liability is not an issue in this case because the stevedore employer is not a joint tort feasor in the strict sense, since he has statutory immunity from liability to the injured employee. If we accept the proposition that the employer-stevedore was not a joint tort feasor to the injured plaintiff, then it would follow that the sole tort feasor in the picture is the shipowner and none of the common law rules with respect to joint and several liability as it applies to joint tort feasors have any application to a sole tort feasor. Instead we are dealing then with a sole tort feasor who is fully liable for all of the damages sustained by the injured plaintiff less, of course, the statutory reduction permitted under the doctrine of comparative fault of the claimant. An excellent treatise on this important issue just recently came forth from Justice Stafford of the Supreme Court of the State of Washington in Seattle First National Bank v. Shoreline Concrete Company 588 P. 2d. 1308 (decided December 28, 1978.). The Court pointed out that it has long been recognized that the single tort feasor is liable for all damage for which his tortious conduct is

a proximate cause. Joint tort feasors are those who have acted in common or have breached a joint duty and concurrent tort feasors are those whose independent acts concur to produce injury. Significantly, the harm caused by either joint or concurrent tort feasors is indivisible. The duties which each breach may be different or divisible duties, but the injury or harm created is not. Each tort feasor's conduct is found to have been a proximate cause of the total indivisible harm and there is no reason for relieving that tort feasor of his responsibility to make full compensation for all the harm of which he has been a proximate cause. The Court then went on to explain comparative negligence and clearly suggests that the doctrine of comparative negligence does not require dissolution of the concept of joint and several liability of tort feasors. Comparative negligence represents a doctrine intended to operate in favor of an injured party by allowing, rather than barring, recovery by one who is contributorily negligent. The concept of joint and several liability of tort feasors has been retained under comparative negligence unless the statute creating comparative negligence specifically abolishes it in all states that have called upon to decide the question. Schwartz, Comparative Negligence. §16.4 at 253. Nor does the trend toward allowing contribution between or among multiple tort feasors in distributing responsibility for paying damages suffered by an injured party require a reduction in that injured party's initial right to recover in full. Contribution between joint tort feasors is a plan which operates exclusively between or among joint tort feasors and is not to be used as a vehicle for restricting an injured party's right to seek

full compensation from the tort feasor he may elect to sue. (Under the law of obligations each tort feasor is liable for the full amount of the victim's damage. When one of the tort feasors is protected by an immunity, such as here, the victim's action is rendered legally inoperable, but if the impediment to that action were removed the obligation would continue to exist, as in the Suits in Admiralty Act, which waives the governmental immunity to actions.) Hence, the immunity of a tort feasor to an action is no impediment to speaking of his liability for the obligation any more than uncollectibility makes a judgment invalid. A tort feasor is a wrongdoer. Two wrongdoers each contributing to an injury are jointly wrongdoers. No stretch of free translation can convert the simple meaning of joint tort feasor. The rule of law was and has always been both in maritime and land based law, that in absence of statute, there is a duty imposed on each to be responsible for the whole to the injured party, regardless of their degree of fault. The harm sustained is an indivisible harm although two or more parties may have each separately been a proximate cause of the injury. The question is whether or not a statutory limitation or immunity for one of the wrongdoers reduces the otherwise right to full recovery from the other. Quite apart from the terminology used, and without regard to joinder or non-joinder of others, the common law principle has been and is: A tort feasor is liable for the entire loss sustained by the injured even though the wrongdoer's acts concurred with another to produce the result. This has been the law maritime, which the shipowner asks this Court to abrogate in its traditional role of formulation of equitable and

fair admiralty rules. This Court, however, is guided by statute, and is not left to its common law flexibility in the instant matter. Of no small moment is Congress' specific intonement that the theory of liability be land based, and under land based theories of liability the injured party is entitled to the same full recovery. This Court does not function as a "super-legislature" to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions. Griswold v. Conn., 381 U.S. 479, 482 (1965). Although members of the Court may feel a certain construction may better serve the interests of justice, the Court will better fulfill the function which the American system has assigned it by confining its analysis to the statute and the legislative history.

IV. Equitable Credit.

The doctrine of "Equitable Credit," apportionment of liability, or by whatever other name, when applied to two common law wrongdoers, strangers to each other, as between themselves, all as reflected in "Reliable," is a just principle. No quarrel can be found at that level of application. The equities become obtuse, shrouded, and more subtle when the same nomenclature is applied to reduction of an individual's right of recovery under conditions here obtained. We deal here not with strangers, but with a shipowner and a stevedore with mutual financial interests, doing business together, sharing profits, in great part produced by the efforts of the longshoreman's labor, and in time passing on all costs to the ultimate consumers of their respective services. To that

interesting alliance comes the competing interest of the worker who before 1972 had in all practical matters the right of full recovery for his injury irrespective of fault. What therefore may have been a fair rule under the factual circumstances reflected in Reliable is tempered by the economic loss which the longshoreman has suffered in giving up the right, and by the added costs of compensation which post-1972 the stevedore assumed.

It is the exception rather than the rule that the injured can find a meritorious cause of action based on negligence of the shipowner as distinguished from unseaworthiness. It is now impalpable that such negligence, if found, whould not vicariously pass to or be shared by the stevedore in charge of the work at the time of injury. In brief, the "Equitable Credit" is a misnomer. It is an "inequitable credit." The inequity in it falls solely upon the employee, who in only the most ethereal of cases will find the shipowner at fault to the exclusion of the stevedore-employer. The equitable credit to which the shipowner is entitled rests in the Act and the quid pro quo of all parties helping to produce it. It is not an equitable credit on a case by case basis, but rather a larger more encompassing credit which says:

> "You, shipowner, no longer are responsible for an unseaworthy condition aboard your vessel in absence of fault. You receive a full and complete credit against any right of recovery formerly permitted against you, when you share no fault. However, when you are negligent, you shall continue to shoulder the full economic burden of the loss sustained."

This is equitable credit working at its fairest. We apportion your loss, not on case by case basis, but on industry wide basis, after hours upon hours of congressional deliberations, weighing the economic and social problems and the burden on the Courts in each ultimate decision.

Congress did not intend to take the last vestiges of recovery from the injured worker. It intended to alleviate the heavy burden placed upon his family when his injury made him incapable of providing the everyday needs of life. Long delays between his injury and his ultimate recovery often left the family destitute. Compensation before the 1972 amendments was grossly inadequate and, in most instances, barely life supportive. The longshoreman exchanged the almost absolute right of recovery permitted by Sieracki for a less adequate, but prompt and regular weekly award. But he was not asked to give up everything. The "Equitable Credit" which he provided was the loss of his most certain cause of action.The near automatic institution of suit against the shipowner upon the happening of an industrial accident no longer occurs. Today each injury is carefully weighed by plaintiff's attorneys everywhere to first determine if a meritorious cause of action exists, and only after an affirmative finding does counsel, with payments contingent, accept the assignment. In the practical aspects of the rules of negligence and the duties imposed on the shipowner to the longshoreman and the corresponding duties imposed on the stevedore, it would appear that rarely could the longshoreman expect a verdict which did not place a large percentage of the fault on the stevedore wrongdoer.

To continuously reduce the longshoreman's award by that percentage would most assuredly destroy the rights of longshoreman to seek his justified redress in our Courts, if only because of the sheer inadequacy of recovery available to him. If the function of our judicial system is thus made unavailable to the injured worker because of economic facts of life, we have done a grave disservice to the interest of justice, to equity and to fairness, which Respondent espouses is concomitant to "proportionate fault."

It is argued that Halcyon is no longer viable because although not expressly overruled, a substantial difference existed in the procedure of the LHWCA when the decision was rendered. This conclusion however, is a misreading of the act as it works today. The only difference in substance between pre-Halcyon days and today is the disappearance of the need to elect previously imposed on the longshoreman. The difficulty of determining the statutory benefits are identical today as then. In these matters where the injury and disability are temporary, compensation payments have been completed and the amount of compensation is fixed and liquidated at the time of settlement or suit. Where, as in the instant case the disability is long lasting and permanent, the amount of compensation changes upward from week to week. The amount is practically indeterminable. Particularly is this true under the amendments where payments change annually in relation to the inflation rate. It is conceivable that an actuarial calculation based on life expectancy

could be made, but at best it would be conjectural and in any event existed prior to the amendment as well.

Although Respondent in its Brief (p. 26) argues that Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974), overruled Halcyon, it would appear to the contrary that Cooper, decided unanimously by this Honorable Court after the 1972 amendments, but on an action created before the amendments, reasserts that "our decision in Halcyon was, and still is, good law on the facts," id. at 115. The instant case is, as in Cooper, indistinguishable from Halcyon.

V. The Burden of Proportionate Fault Falls on the Longshoreman.

Under the concept of workmen's compensation, a workman takes less than his full damages from his employer, but takes promptly and without regard to causation, in return for relinquishment of an uncertain claim for full damages based on the negligence of his employer. If no third party tort feasor existed, that, in itself, would strike a fair and equitable solution between employee-employer. Both would have given up something. But where a third party's negligence contributed to the injury, the reason for the rule and the equity of the arrangement no longer exist. This was one of the many problems envisioned by Congress in its deliberations and was resolved by specifically permitting the third party cause of action and simultaneously prohibiting any direct or indirect

contribution from the stevedore.[1]

Under compensation alone, the employee is paid medical expenses and a portion of his wages. He gives up all non-pecuniary elements of damage, as well as the balance of his wages. To hamper him now from a recovery for those full damages places the entire economic burden upon him and effectively destroys his rights to redress. Had Congress intended for the injured worker to lose all causes of action embraced under the common law it would have been simple to so state. A rule of proportionate fault or equitable credit seeks to do by indirection what Congress says cannot be done directly or indirectly.

VI. The Stevedore's Lien is Recoverable in Full.

The question of how any jury verdict against a ship owner should be divided between the longshoreman and a concurrently negligent stevedore is not before this Court. Whether the entire

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[1] Amicus Brief of Pacific Merchant Shipping Association—p. 40, in an obvious misconception of fee arrangements — suggests that the burden of proportionate liability falls on employees counsel, not employee.

Using Stanley Edmonds figures allowing a $90,000.00 recovery, counsel's charges to Edmonds would be $13,500.00, one-third of the recovery above the lien; not $30,000.00, as suggested by amicus. From the remainder Edmonds would repay the full lien to the stevedore carrier and receive full credit, notwithstanding the charge against the stevedore of an attorney's fee on its share of recovery. Thereafter, the injured employee will be subjected to a credit against furture payments of compensation only to the extent of the net amount received by him after attorney's fees and all other expenses of trial. See Voris v. Gulf Tire Stevedores, 211 F.2nd 549, and Nacirema Operating Co. v. Dostiny, 456 F. 2nd 956.

compensation lien would have to be repaid by the longshoreman on those facts was not decided by the Fourth Circuit opinion. The issue is a red herring injected by shipowner and his amici. However, the great detail devoted to this question in those briefs requires some response from longshoreman here.

A major consideration of Congress was to reduce—not terminate—litigation in the crowded judicial system. It sought to terminate a third party action against the employer and the massive expenses and consumption of effort associated therewith. The stevedore's lien is recoverable in full, therefore, on three bases.

First, the failure to permit recovery would require extended additional litigation involving the stevedore to determine the extent, if any, to which he should be charged. The stevedore cannot and should not look to his employee's counsel to satisfy him on that issue. Circumstances dictate that there are times when a conflict between the two may exist. Stevedore should not be bound by an ex parte finding of fault in its absence. Would the employee to estopped from asserting another and greater degree of fault, or the stevedore, au contraire, a lesser in the interpleader action? Are not employer and employee at different poles on the extent of damages and the degree of permanency? In the instant case, under the Fourth Circuit ruling the stevedore is required to be impleaded and the attendant costs are specifically what Congress sought to prevent.

Secondly, equity and fairness require the full amount to be repaid. The stevedore has, under the

legislative give and take which give rise to the amendments, increased his compensation payments substantially. Although they do not fully compensate the injured worker, they nevertheless have greatly increased the burden to the stevedore. The burden is ameliorated by the savings in litigation expenses and the right to recover in full when and if the injured party has a cause of action for negligence against a third party.[2]

Thirdly, Congress intended it and Congress should amend it if it proves unfair.

CONCLUSION

The purpose of the act is to benefit the injured worker and provide him with needed funds during disability without unduly burdening the shipowner or stevedore. It is purely statutory in creation and must be liberally construed to benefit the worker. A dispute between the shipowner and the stevedore over their respective obligations is ephemeral at best because ultimately the increased or decreased fees of the compensation carrier, based on their reasonable entitlements to profit will be passed on to the shipowner in the stevedore charges for services. Therefore, the only party truly to suffer by the so called "Equitable Credit," "Murray Credit," or

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[2] It must be noted here, that even if employer prevails, and is awarded full recovery, the compensation carrier does not necessarily recover all it has paid and is obligated to pay. Frequently future payments will exceed the employee's recovery, and the stevedore—employer remains liable notwithstanding. Full indemnification, as recited in Amicus Brief, is not always available to the stevedore, especially, as here, where compensation is ongoing.

proportionate fault doctrine is the longshoreman, who can least afford to assume that burden and who, equitably should be at least responsible for that assumption.

Upon examining the relevant authorities with respect to the problems raised when the longshoreman's injury is caused by the concurrent negligence of the shipowner and stevedore-employer, one is immediately struck by the incongruity between the views espoused and the parties who espouse them. First, many of the professional law review articles appear to have been written by attorneys who represent primarily shipowner interests. Second, there appears to be a noticable lack of professional works that support the longshoreman's interests. The incongruity arises when one recognizes that these pro-business as opposed to labor groups traditionally have tended to advocate judicial restraint rather than activisim. The rationale underlying this approach is clear: judicial activism has historically represented a trend toward greater employee recovery at the cost of the employer or third party. Under the 1972 amendments, however, the implementation of an activist approach by the courts would signify more favorable treatment for the shipowner. Hence, the party who would ordinarily argue that restraint is the proper role for the judiciary is now asserting, of course employing other terms, that only judicial activism can cure the ills created by Congress.

In all due respect to these commentators, judicial restraint and not activism is the proper

solution for the problem posed by the 1972 ammendments. This approach may lead to injustices on certain occasions, but Congress, and not the judiciary, enacted the amendments. Further, it must be emphasized that although judicial activism may at times be proper, the issues present in this area involve complex policymaking decisions. Judicial interference can only complicate an already confusing situation. If statutory modification of the 1972 amendments is necessary, this task should be accomplished by the legislature. Steinberg, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen Against Shipowners - a Proposed Solution 37 Ohio St. L.J. 767 (1976).

WHEREFORE, it is respectfully submitted that the opinion of the Fourth Circuit is erroneous and should be reversed by this Honorable Court and judgment entered in favor of Stanley Edmonds in the amount of the jury's verdict.

RESPECTFULLY SUBMITTED

Calvin W. Breit

CALVIN W. BREIT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief were mailed, postage paid, to Charles F. Tucker, Esquire, Vandeventer, Black, Meredith and Martin, One Commercial Place, Virginia National Bank Building, Norfolk, Virginia, attorney for the Respondent; to David R. Owen, Esquire, Messrs. Semmes, Bowen & Semmes, 10 Light Street, 11th Floor, Baltimore, Maryland 22102, attorney for Liberty Mutual Insurance Company, amicus curiae; to Paul S. Edelman, Esquire, Messrs, Kreindler & Kreindler, 99 Park Avenue, New York, New York 10016, attorney for American Trial Lawyers Association, amicus curiae; Thomas D. Wilcox, Esquire, 919 Eighteenth Street, N.W., Washington, D.C. 20006, attorney for National Association of Stevedores, amicus curiae; to Graydon S. Staring, Esquire, Messrs. Lillick, McHose & Charles, Two Embarcadero Center, San Francisco, California 94111, attorney for Pacific Merchants Shipping Association, amicus curiae, and to Randall C. Coleman, Esquire, Messrs. Ober. Grimes & Shriver, 1600 Maryland National Bank Building, Baltimore, Maryland 21202, attorney for American Export Lines, et als, amici curiae, this 12 day of March, 1979. 40 copies to Clerk, United States Supreme Court, Washington, D.C.

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MOTION FILED
DEC 21 1978

IN THE

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OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS
Petitioner

v.

COMPAGNIE GENERALE TRANSATLANTIQUE
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 42(3) of the Supreme Court Rules, the National Association of Stevedores respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the petitioner. Counsel for the petitioner has consented to the filing of this brief. Counsel for respondent has not.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-Profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and suporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 61 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the state of Hawaii. Based upon U.S. government manhour statistics for calendar year 1974 it is conservatively estimated that NAS member companies are responsible for over 70 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor, some of whom may be entitled to federal Longshoremen's and Harbor Workers' Compensation Act,[1] (hereinafter the "LHWCA") and some of whom may be subject to state workers' compensation laws. The NAS member companies are directly responsible for workers' compensation payments under both federal and state law either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interests of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker.

LHWCA insurance costs, be they premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits, the amount of such benefits, or the amount of damages recoverable from a third party in an action in negligence has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Courts of Appeals and in this court in *Northeast Marine Terminal Corp.*, v. *Caputo et al.*, 432 U.S. 249 (1977).

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured longshoremen such as the petitioner in this case. *Amicus curiae* does not believe that the parties have considered the issue before this Court in precisely the same manner.

[1] 33 USC § 901 *et seq.*

Amicus curiae therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Statute Involved	1
Question Presented	3
Summary of Argument	3
Argument	6
The Decision Below	7
The Statute and The Legislative History	9
The Inequity of Apportionment of Damages	12
The 1972 Compromise	14
What is the True Extent of Edmonds' Injury	16
The Issue Here is Congress' to Decide	22
Conclusion	26
Appendices	1a

TABLE OF AUTHORITIES

STATUTES

	Page
Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 901 *et seq.*	*passim*
33 USC § 905(a) (b)	*passim*
33 USC § 906(b)	15
33 USC § 908(d) (3)	17
33 USC § 908(f)	17
33 USC § 909	15, 17
33 USC § 910(f)	15
33 USC § 914(a)	15, 19
33 USC § 914(f)	16
33 USC § 919	19
33 USC § 921	17, 19
33 USC § 921(c)	19
33 USC § 922	19, 20
33 USC § 928	16
33 USC § 933	8, 9, 17, 19
Public Law 92-576, 86 Stat. 1251 *et seq.*	1, 15

COURT DECISIONS

Baker v. *Pacific Far East Lines, Inc.*, 451 F.Supp. 84 (DC, ND Cal 1978)	14
Blommer v. *C. Y. Tung and Eckert Overseas, Agency, Inc.*, —— F.2d —— (2nd Cir. No. 1187 dec., Oct. 13, 1978)	18
Cella v. *Partenreederie M. S. Ravenna*, 529 F.2d 15 (1st Cir. 1976) cert. denied 425 US 975 (1976)	8, 13, 18
Cooper Stevedoring Co. v. *Fritz Kipke, Inc.*, 417 US 106 (1974)	13, 23
Dawson v. *Contractors Transport Corp.*, 467 F.2d 727 (DC Cir. 1972)	13

TABLE OF AUTHORITIES—Continued

	Page
Director, Office of Workers' Compensation Programs, et al. v. *Rasmussen et al.*, Supreme Court Nos. 77-1465, 1481	6
Dodge v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975) cert. denied 425 US 944 (1976)	8
Edmonds v. *Compagnie General Transatlantique*, 577 F.2d 1153 (4th Cir. 1978)	7, 8, 10
Halcyon Lines v. *Haen Ship Ceiling & Refitting Corp.*, 342 US 282 (1952)	13, 23, 24
Murray v. *United States*, 405 F.2d 1361 (DC Dir. 1972)	13
Nacerima Operating Company v. *Johnson*, 396 US 212 (1969)	23
Northeast Marine Terminal Company, Inc. v. *Caputo et al.*, 432 US 249 (1977)	6, 7, 14, 23
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Pope & Talbot Inc. v. *Hawn*, 346 US 406 (1953)	13
Victory Carriers v. *Law*, 404 US 202 (1971)	23
Samuels v. *Empressa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978)	8
Shellman v. *United States Lines*, 528 F.2d 675 (9th Cir. 1975) cert. denied 425 US 936 (1976)	8
United States v. *Reliable Transfer Co.*, 421 US 397 (1975)	13
Zapico v. *Bucyrus-Erie Co.*, 579 F.2d 714 (2nd Cir. 1978)	8

TABLE OF AUTHORITIES—Continued

Page

AGENCY DECISIONS

Ballard v. *Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 676 (1978) 21
Ford v. *Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978) 21
Kilsby v. *Diamond Drilling Co.*, 6 BRBS 114 (1977) 21
McCray v. *Ceco Steel Co.*, 5 BRBS 537 (1977) 21

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

THE STATUTE INVOLVED

This case involves the proper construction of section 5 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 USC § 905, as amended by section 18(a) of Public Law 92-576, 86 Stat. 1263, and in particular to new section 5(b). Sections 5(a) and (b) of the LHWCA now provide:

EXCLUSIVENESS OF *REMEDY AND THIRD-PARTY* LIABILITY

SEC 5. (*a*) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under *the* Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, *or* that the employee assumed the risk of his employment, *or* that the injury was due to the contributory negligence of the employee.

(*b*) *In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship*

building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act. (The matter in italics was added by Public Law 92-576).

QUESTION PRESENTED

In an action in negligence brought by an injured longshoreman against a vessel owner, not his direct employer, does section 5(b) of the LHWCA, 33 USC § 905(b), permit a reduction in the vessel owner's liability to the injured longshoreman when, in addition to the vessel owner's negligence, there is contributing negligence of the injured longshoreman and his direct employer, a stevedore contractor responsible for the payment of worker's compensation benefits to the injured longshoreman under other provisions of the LHWCA?

SUMMARY OF ARGUMENT

This case is the third of four cases this Court has agreed to hear involving the 1972 amendments to the LHWCA which have been characterized by courts and commentators as lacking clarity and precision. The lack of clarity and precision has caused chaos and confusion in industries and their insurance carriers affected by the LHWCA to such a degree that LHWCA insurance is virtually unobtainable, or when obtainable, only at extraordinary cost. Because of this the Subcommittee on Compensation, Health and Safety of the House of Representatives Committee on Education and Labor in the 95th Congress has conducted extensive oversight hearings and has printed one volume of its hearings for the

year 1977. The 1978 hearings and committee report are yet to be published by the Subcommittee.

This case involves the interpretation of one of the cornerstone amendments to the LHWCA in 1972, and particularly an attempt by respondent and the Fourth Circuit Court of Appeals to attribute to the 1972 Congress a knowledge of a development in the maritime law of damages announced by this Court in 1975. The NAS believes that the legislative history of the 1972 amendments and the law itself demonstrate that Congress in 1972 was completely unaware of what this Court would do in 1975, and that it plainly did not intend the result of the decision of the Fourth Circuit concerning the apportionment of damages in an action in negligence brought by an injured employee against a vessel which was not his employer. Indeed, all other Circuit Courts of Appeals which have decided similar cases have decided them exactly the opposite of the Fourth Circuit's decision in this case.

The NAS believes that the Congress in 1972 did not knowingly or inadvertently change existing law on the measure of damages a negligent third party owed to an injured employee of a stevedore contractor who was providing stevedoring services to the vessel or to any other entity. It is clear that Congress did accept existing law that the negligence of the injured worker could be deducted from the total jury found damages against the negligent third party vessel, but that Congress did *not* also permit a deduction from such damages for the negligence of fellow workers of the injured employee nor of his employer. Congress did intend that in the action in negligence the negligence of the fellow worker or employer could not be the only basis for a finding of negligence by the vessel. Some active negligence must be proved to have been the vessel's. That is all that Congress intended on that subject.

The NAS also believes that when Congress declared unlawful indemnification agreements between the vessel and the employer and expressly made the employer liable to the injured worker only for LHWCA compensation benefits, and nothing else either directly or indirectly, that Congress realized that the employer and its insurance carriers would have to husband all available resources to pay for the greatly increased LHWCA compensation benefits. Adoption of the rule announced by the Fourth Circuit would directly contravene that intent of Congress and would create an incalculable drain on the resources needed to pay the increased compensation benefits.

Finally, in view of the fact that the Congress is in the process of extensive legislative review of the LHWCA and the 1972 amendments and that further amendments to the Act are probable, the NAS submits that it would be inappropriate for the Court at this time to make such a drastic change in existing law as urged by the respondent and the Fourth Circuit. The respondent should present its case to the Congress as has every other interested party for the past two years. The issue here has enormous ramifications which spread far beyond respondent's interest in reducing its obligation to Stanley Edmonds. The decision in this case will seriously affect every employer, employee, and insurance carrier to which the LHWCA applies. Such a decision should not rest solely on the interests in this case, especially when the affected employer and its insurance carrier were not even involved in the litigation and the Congress is reviewing in extensive oversight hearings all aspects of the Act.

ARGUMENT

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) 33 USC § 901 *et seq.* by enacting Public Law 92-576. As this Court has stated, in 1972 the Congress attempted to meet the expressed desires of (1) ship owners, (2) employers of longshoremen (stevedores), and (3) longshore workers "by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and 'hold harmless' or indemnity agreements [; continuing] to allow suits against vessel or other third parties for negligence [; and raising] benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act" *Northeast Marine Terminal Co.* v. *Caputo*, 432 US 249 (1977). Congress' lack of precision in accommodating the conflicting interests has been noted by this Court and every other federal court which has been required to interpret the 1972 amendments. Indeed, this is the third time this Court has agreed to hear a case involving the 1972 amendments. First, it was *Northeast Marine Terminal Co., supra*, on the question of the shoreward extension of LHWCA coverage by the 1972 amendments. The second is *Director, Office of Workers' Compensation Programs et al.* v. *Rasmussen et al.*, Nos. 77-1465 and 1481 now pending, concerning the issue of the limitation on LHWCA death benefits, and the third is this case.[2] In each instance, Courts of Appeals have reached differing conclusions requiring this Court to ultimately decide what Congress actually did in 1972.

[2] Recently the Court has accepted a fourth case, *P. C. Pfeiffer Company et al.* v. *Ford et al.*, No. 78-425.

As a result of this Court's decision in *Northeast Marine Terminal Co., supra* stevedore employers found that many more workers than they had thought were entitled to the substantially increased benefits of the LHWCA. If the court agrees with the Ninth Circuit in *Rasmussen, supra* the stevedore industry and all other covered employers will learn to their dismay that benefit levels were increased far beyond their understanding of what Congress intended. But the controversy presented by this case is the basic cornerstone of the 1972 amendments compromise, and if the decision of the Fourth Circuit prevails, then there was no compromise. The stevedore employer will have lost much more than he gained. All of the pre-1972 disabilities and injurious extensive third-party litigation will be restored to the stevedore employer plus substantially increased compensation obligations to a much greater number of workers. In return for virtually nothing the stevedore industry will be faced with almost unrestricted compensation liability; an almost nonexistent insurance market; and endless third-party litigation to determine the amount of neglience, if any, of the vessel, the employer, and the injured employee, and the distribution of the employee's third-party recovery. As to this industry, the disaster of 1972 will be complete, and to some, final.

The Decision Below

The decision of the Fourth Circuit,[3] knowingly and deliberately contrary to every other Circuit Court which has decided the issue, permits a jury to decide the total amount of damages to which an injured worker is entitled, and then the degree of negligence of (1) the employer, (2) the worker, and (3) the third party vessel. The third party would be obliged to pay the worker directly, damages equal only to its percentage of all

[3] *Edmonds* v. *Compagnie Generale Transatlantique*, 577 F.2d 1153 (4th Cir. 1978).

negligence. In this particular case the employer was found to be 70% at fault even though he was not a party to the action, and could not have been made a party by either the injured worker or the third party vessel. Because Edmonds' employer was not a party to any of the proceedings in the District Court or the Fourth Circuit the Court did not decide nor discuss the employer's compensation lien against the jury award authorized by section 33 of the LHWCA (33 USC § 933).

In limiting the damages Edmonds was to receive from the vessel to that portion of the total jury award directly attributable to Compagnie Generale Transatlantique (CGT), the vessel owner, the Fourth Circuit stated:

> "Our holding is only that he may not recover from the ship damages attributable to the neglect or actions of his fellow longshoremen or others than the ship's crew.
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> "We are aware, of course, that our decision today is in conflict with decisions in the Fifth and Ninth Circuits." (577 F.2d at 1156)[4]

In addition, the Court's decision is also in conflict with decisions of the First and Second Circuits.[5]

CGT and other vessel owners now assert that in an action in negligence brought by an injured longshoremen Congress in 1972 intended that the vessel only pay to the injured worker that portion of jury-found damages solely attributable to the vessel, its agents and servants (in this case, only $20,000 of $100,000).

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[4] *Samuels* v. *Empressa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. May 26, 1978); *Shellman* v. *United States Lines*, 528 F.2d 675 (9th Cir. 1975) *cert. denied*, 425 U.S. 936 (1976); *Dodge* v. *Mitsui Shinataku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975) *cert. denied*, 425 U.S. 944 (1976).

[5] *Cella* v. *Partenreederei M.S. Ravenna*, 529 F.2d 15 (1st Cir. 1976), *cert. denied* 425 U.S. 975 (1976), and *Zapico* v. *Bucyrus-Erie Co.*, 579 F.2d 714 (2nd Cir. June 15, 1978).

The Statute and the Legislative History

The statute is totally silent on this point. Section 905(b), (33 USC § 905(b)), simply provides that (1) an injured worker may bring an action in negligence against the vessel pursuant to section 33 of the Act; (2) the employer shall not be liable to the vessel for such damages directly or indirectly; and (3) any agreements or warranties between the employer and the vessel to the contrary shall be void. The liability of the vessel is not to be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. Sections 905(a) and (b) do not mention degrees of employer fault, and section 905(a) specifically proscribes defenses of negligence of fellow servants, assumption of the risk, and contributory negligence.

It has been held that the statute permits the comparative negligence of the *employee* to be offset against jury-awarded third-party damages, and Congress in 1972 recognized the judicially fashioned rule of comparative negligence in only one limited instance. The Committee reports provide:

> ". . . the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the *injured employee's own negligence* may have contributed to causing the injury." (Senate Report 92-1125, page 12; House Report 92-1441, page 8, emphasis supplied, 92nd Cong. 2nd Sess. in 3 U.S. Code Cong. & Admin. News pg. 4705).

That passage is the only mention of comparative negligence in either Committee report, and neither report nor the statute itself address the question of contributing or comparative negligence of the *employer* in negligence actions brought by the injured worker against a vessel.

Congress did not intend for the employer to be a party to such actions, and expressly limited the injured worker's recourse against his employer to statutory compensation, and prohibited the vessel from *directly* or *indirectly* passing on any portion of its liability to the employer.

> "Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.
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> Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.
>
> Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages." (Senate Report, Page 11, House Report pg. 7.)

The Fourth Circuit apparently recognizes the intent of Congress insofar as exclusivity of remedy as between employer and employee and the proscription of indemnity and contribution under any circumstances between vessel and stevedore (577 F.2d at 1154). However, the Court felt that apportionment of damages is permitted because of an alleged conflict between the first and second sentences of Section 905(b) (577 F.2d at 1155).

We submit that the Court has misread the statute, and that the first and second sentences in the section refer to different factual situations. So understood, the first and second sentences are not in conflict. The first sentence refers to actions against the vessel when the employer is not the vessel, its owners or agents. That sentence provides that the vessel may not seek directly or in-

directly to recover any portion of its damages from the injured man's employer. Obviously, if the vessel were the man's employer it would not seek to collect a portion or all of its damages from itself.[6]

The second sentence applies only in negligence actions when the vessel is the direct employer of the injured employee. The first clause makes that clear beyond doubt. The sentence provides:

> "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

That simply means that if the vessel directly employs persons to provide stevedoring services then the negligence of fellow longshoremen cannot be the basis of the vessel's negligence. The Committees recognized the unique situation that arises when the vessel is the direct employer and attempted by the second sentence in 905(b) to address that problem stating:

> "The Committee has also recognized the need for *special provisions to deal with a case where a longshoreman is employed directly by the vessel.* Accordingly, the bill provides in the case of a *longshoreman who is employed directly by the vessel* there will be no action for damages if the injury was caused by

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[6] The first sentence provides: "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." It is worthy to note that Section 5 does not include any mention of actions against other possible third parties against whom the injured worker may bring a suit under Section 33, such as trucks, railroads, or other entities to whom the worker's employer also provides service. What of apportionment in those situations?

> the negligence of persons engaged in performing longshoring services." (Senate Report, page 11, House Report, pg. 7, emphasis supplied).

Stanley Edmonds was not directly employed by CGT, so it is obvious that the second sentence of Section 905(b) does not apply to this case. Edmonds was a direct employee of the stevedore contractor, and the only limitation on the damages owed to him by the negligent vessel was Edmonds' own comparative negligence, not that of his employer or of his fellow longshoremen.

In every Circuit Court of Appeals except the Fourth, CGT would have been obliged to pay $90,000 in damages to Stanley Edmonds, and his employer or insurance carrier would have a lien against that amount equal to LHWCA compensation paid and to be paid in amounts determined by the Secretary of Labor or the Benefits Review Board. The Fourth Circuit believes that it would be inequitable (as to CGT) to follow its sister circuits and that CGT should be obliged to pay only 20 percent of the jury determined measure of damages. The Court recognized, but properly did not discuss, the impact of its decision upon the employer or its insurance carrier.

The Inequity of Apportionment of Damages

Prior to the 1972 amendments, if a longshoreman was injured on a vessel and both his employer and the vessel were partially negligent the stevedore employer, due to the now abolished indemnification agreements and the "seaworthiness" actions, the employer and its employee were often pitted in a contest to ascertain the degrees of negligence. Congress thought that situation to be contrary to public policy and sought to eliminate it and the exercise of the superior economic strength by the ship owner which compelled the employer to agree to indemnify the ship from its obligation. Thus, the doctrine of seaworthiness as

a basis for an action by a longshoreman against the ship was eliminated, and all devices to force the stevedore employer to assume or contribute to the ship owner's damages were declared void as contrary to public policy. LHWCA benefits were increased substantially and the plethora of third-party litigation substantially eliminated.

In 1975 this Court handed down its decision in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) and the equitable or Murray credit announced before enactment of the 1972 amendments by the U.S. Court of Appeals for the District of Columbia surfaced. *Murray* v. *United States*, 405 F.2d 1361 (DC Cir-1968), *Dawson* v. *Contractors Transport Corp.*, 467 F.2d 727 (DC Cir-1972). Until the decision of the Fourth Circuit all courts have rejected those theories or doctrines, especially in the light of this Court's decisions in *Halcyon Lines* v. *Haen Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), and *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

Until the Fourth Circuit's decision all parties agreed with the First Circuit that as a result of the 1972 amendments:

> "The stevedore-employer is no longer in the position of an adversary to an injured longshoreman in a third party suit." *Cella* v. *Partenreederei M.S. Ravenna*, 529 F.2d 15, 20 (1st Cir.-1976), *cert. denied*, 425 U.S. 975 (1976).

The Fourth Circuit's decision would change that. The litigation Congress sought to eliminate in 1972 would be restored in all respects, and the courts will be flooded with three party contests over degrees of negligence. Once again employer would be pitted against employee about degrees of negligence in litigation plainly contrary to the underlying scheme of workers' compensation law and the expressed intent of Congress.

The 1972 Compromise

Let us look at the results of the 1972 amendments and who gave up what or got what in return.

A. *The Vessel Owner*

The vessel owner gave up the right to require the stevedore contractor to indemnify it, hold it harmless, or otherwise contribute directly or indirectly to jury-found damages owed by the vessel for its negligence in an injury to an employee of the stevedore contractor. In return the vessel owner escaped liability without fault under the "seaworthiness" doctrine, and in addition, obtained immunity from certain suits for damages by persons in its direct employ. *Baker* v. *Pacific Far East Lines, Inc.*, 451 F. Supp. 84 (DC No. Cal. 1978).

B. *The Longshoreman*

The longshoreman gave up the right to bring an action against the vessel predicated upon no-fault, or "seaworthiness," but retained the right to bring an action in negligence. In return the longshoreman's scope of employment subject to the LHWCA was substantially enlarged, *Northeast Marine Terminal Co., supra* and the benefits payable under the LHWCA by his employer were incredibly increased.

C. *The Stevedore Employer*

The stevedore employer gave up no benefit, but was relieved of being forced by superior economic strength to indemnify or hold harmless the vessel owner in actions brought for damages by his employees against the vessel. He was also to be immune from suits by vessels for contribution to damages awarded against it.

In return for protection from the demands of its customers the stevedore employer found that many more of

his employees than before 1972 were entitled to the increased LHWCA benefits. Compounding that are the incredible levels of compensation benefits brought about by the 1972 amendments.

1. Prior to 1972 the maximum amount of weekly benefits payable was $70. Today the maximum is $396.78 (33 USC 906 (b)).[7]

2. Prior to 1972 weekly death benefits payable to survivors could not exceed 66 2/3 percent of $105. Now the limit on death benefits is 66 2/3 of 200 percent of the national average weekly wage ($396.78), subject to escalation annually.

3. Prior to 1972 death benefits were to be awarded only if the injury caused the death. Today, death benefits may be awarded in certain instances even if the death is unrelated to the injury or even to the employment (33 USC 909).

4. Today, many compensation benefits are escalated annually predicated upon annual increases in the average weekly wage as determined by the Secretary of Labor (33 USC 910 (f)).

5. The maximum amount of compensation benefits of $24,000 was eliminated. (Sec. 5(e) of PL 92-576)).

6. Today, required LHWCA insurance is virtually unobtainable, and, when it is, the premium costs far exceed the 1972 levels.[8]

7. As before 1972, the stevedore-employer, regardless of fault, must promptly and regularly pay LHWCA benefits to his injured employees (33 USC § 914(a)) unless

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[7] Department of Labor Letter No. 37, Sept. 29, 1978, Appendix B to this brief.

[8] House LHWCA Oversight Hearing, Vol. 1, 95th Congress, *infra*, pgs. 447, 462-481.

he controverts the employee's right to compensation. But today, if he controverts and loses he not only must pay the compensation plus fines and penalties (33 USC § 914(f)), but he must also pay the attorney fees of the injured worker (33 USC § 928).

As one witness testified to the Congress in 1977 during legislative oversight hearings into the LHWCA—*"The scale does not balance."*[9] Indeed, the scale is so unbalanced that every affected industry which is required to pay LHWCA benefits to its employees presented its grievances to the House subcommittee in 17 days of testimony during the 95th Congress, as is set forth in the subcommittee's report of October 14, 1978, *Congressional Record*, November 9, 1978 pages E5959-61 which is attached to this brief as Appendix A. Noticeably absent during those two years of hearings were those in whose favor the scales were most favorably tilted—the vessel owner.

What is the True Extent of Edmonds' Injury

It must be realized that there are two entities charged with the responsibility of determining the extent of tort damages and compensation payable to Stanley Edmonds as a result of his injury.

As to compensation payments, those payments necessary to compensate him for his injury and his loss of wage earning capacity (presumably the same factors to be considered as damages) Congress placed that responsibility on the Secretary of Labor and the Benefits

[9] (Hearings before the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, entitled "Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Part 1," at page 441.) The second volume of testimony given to the subcommittee in 1978 and the Committee staff report have not yet been printed.

Review Board, subject to limited appellate review by the Federal courts (33 USC § 921). Liability of the employer is absolute and interminable. It is not predicated upon his fault nor is it in any way mitigated by the contributory negligence of the employee, who may be 100% at fault and still recover full LHWCA benefits.

In this case Stanley Edmonds has already received LHWCA compensation benefits for temporary total and permanent partial disability from his employer-carrier in excess of $46,000 and continues to receive weekly payments of $184.07 (Initial Brief of *Amicus Curiae* Liberty Mutual at page 6). Every year, unless the extent of his disability is changed pursuant to section 22 of the Act (33 USC § 922), he will receive an additional $9,571.64. In only six years he will have received in excess of $100,000 in LHWCA compensation benefits plus damages recovered from CGT. Resolution of the third-party case between Edmonds and CGT does not extinguish the employer's liability for LHWCA compensation payments (33 USC § 933(f)) which may continue until his death or the death of his last survivor. If Edmonds were to die from an unrelated cause while receiving benefits for permanent partial or permanent total disability, LHWCA death benefits would be payable by the stevedore employer to his survivors (33 USC § 909, § 908(d)(3) and (f) regardless of the cause of death.

If compelled to litigate degrees of negligence including its own in a trial by jury involving the employer, the injured worker, and the vessel with all of the available discovery procedures provided by the Federal Rules of Civil Procedure, the legal fees the employer must incur will be enormous. In this case, had the employer been a party, those legal fees could well have exceeded $20,000. Stanley Edmonds, one way or another, would still receive $100,000. CGT would have paid $20,000 plus its legal fees. The employer would have paid, and will continue

to pay, compensation minus whatever recoupment he could obtain from Edmonds, plus his own legal fees at every stage of the proceedings.

Such a result, which is more probable than possible, would destroy what one court has recognized as a major reason why indemnity actions and employer contribution were prohibited by Congress, stating:

> "Elimination of the seaworthiness cause of action against the shipowner, and the indemnity action against the stevedore was necessary to insure adequate funds for the increased benefits. In particular, the drain on the employer's resources by the attorney's fees and expenses required to litigate the third party indemnification actions was cited as an obstacle to funding adequate compensation benefits." (House Report 92-1441, 92nd Congress, 2nd Session in 3 U.S. Code Cong. & Admin. News, p. 4698, 4702 (1972). Senate Report 92-1125, 92nd Cong., 2nd Sess. (1972).
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> "We conclude that the overriding purpose of the 1972 amendments was to strictly limit the liability of the stevedore in order to husband its resources, and its insurance carrier's resources, for payment of increased benefits under the Act." (*Cella* v. *Partenreederi, M.S. Ravenna, supra,* at 529 F.2d pp. 20-21).

The reasoning of the First Circuit concerning the intent of Congress in 1972 to encourage the husbanding of the stevedore's and the insurance carrier's resources for the payment of increased LHWCA Compensation was recently adopted *per curiam* by the Second Circuit in *Bloomer* v. *C. Y. Tung and Eckert Overseas, Agency, Inc.*, No. 1187 decided October 12, 1978, —— F.2d —— (2nd Circuit-1978).

The full measure of the drain on the resources of the employer's insurance carrier to pay the increased compensation benefits under the Act is readily demonstrated.

If the employer controverted Edmonds' claim for permanent partial and temporary total disability pursuant to Section 14 of the Act (33 USC § 914) it would have to first go through a full administrative law proceeding before an administrative law judge (33 USC § 919(d)), and then a review proceeding before the Benefits Review Board (33 USC § 921(b)(3)), and then an appellate review in the appropriate U.S. Court of Appeals (33 USC § 921(c)). If an award of compensation is finally upheld, the employer-carrier must pay the award and his own attorney's fees plus those of the impaired worker (33 USC § 928). Throughout those proceedings the degree of fault of any party is not in issue. The only issues are whether the injury is covered by the Act, and if so what are the statutory benefits to be paid.

While the administrative process is being pursued, the injured worker may bring on action in negligence against the vessel as authorized in Section 5 and 33 of the Act (33 USC § 905, § 933).[10] If the injured worker recovers damages from the vessel the employer-carrier still must continue to pay LHWCA compensation if the compensation award of the Secretary of Labor exceeds the amount of jury-awarded damages recovered (33 USC § 933(f)). However, those compensation payments are only to be *in excess* of the damages recovered. All courts, including the Fourth Circuit, recognize that because of Section 33 of the Act, the employer has a lien or trust against the damages recovered equal to past and future compensation payments determined by the Secretary of Labor. Thus, in some measure the drain on the resources of the employer-carrier necessary to pay compensation is relieved. However, if any apportionment of damages involving the employer is granted, then the drain on the

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[10] Unless the worker is receiving compensation payments under an award by the Secretary, neither the employer nor its insurance carrier may bring an action against the vessel to recover the compensation payments (33 USC § 933(b), (d) and (h)).

employer-carrier resources is not relieved. In fact, it is further exacerbated, as it must then engage in an another new arena of costly litigation—the negligence action.

Having expended substantial resources to limit its compensation liability the employer-carrier must contemplate the expenditure of substantially more of its resources or sit idly by while others litigate its fortunes. The dilemna the employer faces cannot be over-stated. In the third party action does it argue that its employee was at fault, and thus act against its monetary interest in the amount of lien recovery? Or does the employer argue that the vessel was totally at fault and subject itself to the superior economic retaliation of its customer, also against its monetary interest? In almost every port in the nation it is relatively easy for a vessel to change stevedores, or to provide its own stevedoring services directly.

Whichever way the employer argues it must of necessity incur the legal expenses attendant to trials by jury in the district courts and appeals in the Circuit Courts of Appeals. The drain on its resources is compounded, and non-recoverable. It cannot simply pass on its added costs to the vessels for which it provides stevedoring services as competition will not permit it to do so.

Still another drain on the employer-carrier's resources looms on the horizon. If the injured worker is dissatisfied with the damages recovered from the third party he may return to the administrative forum of the LHWCA and request that the original compensation award be amended pursuant to Section 22 (33 USC § 922). The entire LHWCA administrative process commences anew, and the philosophy of the Benefits Review Board virtually insures an increased award. For example, in the instant case there is temporary total disability. The Benefits Review Board has determined that temporary total disability extends until the injured worker reaches maximum

medical recovery, *McCray* v. *Ceco Steel Co.*, 5 BRBS 537 (1977) and during that period of time compensation equal to 66 2/3 of his actual weekly wage is to be paid. There are instances where temporary total disability benefits have been paid in excess of five years.

The move from temporary total to permanent total disability is a simple matter today. No medical evidence is required. *Ballard* v. *Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 676 (1978). The fact that the worker may be able to work and earn wages does not preclude a finding of permanent total disability, *Ford* v. *Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978), and the employer must find actual and suitable work opportunities in the locality where the worker lives in order to defeat a claim for permanent total disability, *Kilsby* v. *Diamond Drilling Co.*, 6 BRBS 114 (1977).

On the other hand, the liability of the negligent third party vessel is determined by a jury and its findings are final and complete. The compensation liability of the employer is indeterminate.

Apportioning damages in ship collision cases may be appropriate, if only because at the time of apportionment the full and total damages are certain and final. However, when, as here, the injured worker has two avenues of recovery and two measures of damages, one of which (compensation) is uncertain and not final at the time of apportionment, apportionment is not appropriate. The third party tortfeasor should be held responsible for the full amount of negligence damages, and the employer for the full amount of compensation damages less the amount the injured worker recovered in damages from the third party vessel.

If the jury awards damages in excess of the compensation determined by the Secretary of Labor, the injured worker gains in his total recovery. If the jury awards

damages equal or less than the compensation determined by the Secretary of Labor, the injured worker actually receives no damages for the vessel's negligence, but does collect the full measure of compensation regardless of his own negligence.

Applying the reasoning of the Fourth Circuit to this case, the only winner is CGT as it would only be required to pay 20% of what may not really be the true amount of damages suffered by Stanley Edmonds. In that regard it must be asked "just what is the true measure of damages?" Is it what a jury awards or is it what the Secretary of Labor and the Benefits Review Board award pursuant to the provisions of the LHWCA?

Prior to 1972 those questions required no answer because the LHWCA benefits were so low and indemnification agreements, expressed or implied, so prevalent that it was unnecessary to know the answer. The stevedore employer paid everything. Today, the 1972 amendments authorize compensation at levels that would make a jury blush, and the employer's liability can be prolonged and virtually interminable.

The Issue Here is Congress' to Decide

Congress did not address this problem in 1972 just as it did not address the cost impact on employers or carriers of most of the changes it made in the Act. *Pittston Stevedoring Corporation et al.*, v. *Dellaventura et al.*, 544 F2d 35, (2dn Circuit 1975) affirmed *sub nom Northeast Marine Terminal Co., supra.* If apportionment of personal injuries damages founded on negligence is to be introduced into the law then it should be done by the Congress and not by the Courts. This is especially true since Congress has been reviewing for almost two years just what it did in 1972. The NAS believes that the

vessel owners should present their case to the Congress and let it determine if it has merit.[11]

Amendments to the LHWCA properly are the function of the Congress. As to the scope of shoreside coverage of the LHWCA this Court deferred to Congress in 1969, *Nacirema Operating Company* v. *Johnson*, 396 US 212, at 223-224 (1969), and again in 1971, *Victory Carriers* v. *Law*, 404 US 202 at 216 (1971). Congress responded in 1972 by enacting Public Law 92-576, *Northeast Marine Terminal Co., supra.*

In 1952 this Court deferred to Congress on the issue of contribution or apportionment of damages between a negligent vessel and a concurrently negligent stevedore employer as it concluded that the solution to that problem should await congressional action, *Halcyon Lines, supra,* 342 US at 285. In 1973 this Court had the opportunity to consider its decision in *Halcyon,* and concluded that the factors underlying that decision still had much force, *Cooper Stevedoring Co., supra,* 417 US at 112, stating:

> "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers,

---

[11] The Congress might very well decide that if damages for negligence are to be apportioned between the employer, the employee, and the third party vessel, then so too should workers' compensation benefits payable to the employee for the same incident. If the vessel is found to be negligent it should be responsible for its shares of *all damages,* tort or compensation, to be paid to the injured worker, whose injury it caused in whole or in part. In this case, for example, 20% of the jury award and 20% of the compensation award of the Secretary of Labor until the compensation award and possible amendments thereto, is fully and finally paid, or until all voluntary payments cease. On the other hand, Congress might also terminate all compensation payments when a third party recovery is obtained. (See also the comment of Subcommittee Chairman Gaydos—"Well, we will let the shipowners plead their own case." House LHWCA Oversight Hearings, Vol. 1, *supra,* pg. 442.)

employees, and their respective insurors, we refrained from allowing contribution in the circumstances of that case.

These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation should be the employee's exclusive remedy."

It is clear that Congress in 1972 did not change the rule that there could be no contribution between the stevedore employer and a negligent vessel for damages awarded the injured longshoremen. Congress did not, inadvertently or otherwise, overrule *Halcyon*. The Committee reports pertaining to Public Law 92-576 don't even mention *Halcyon*. Neither do they mention apportionment of damages in any context except as between an injured worker and a vessel when the injured employee's own negligence may have contributed to causing the injury. In that regard Congress merely restated the applicable law of damages and fashioned no new defense of which shipowners could avail themselves.

Even though Congress did extensively amend the LHWCA in 1972 it did not change the law as to third party damages. That subject is now precisely where this Court found the issue of contribution in *Halcyon* in 1952, and the factors underlying the *Halcyon* decision pertain today (342 US at 285, 286),

"In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provided protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone

else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee. Congress has made further inroads on traditional court law by abolition of the defenses of contributory neglience and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act, the Public Vessels Act, the Limited Liability Act and the Harbor Act. *Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run.* A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies

are opposed to such a change. Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." (Citations and footnotes omitted, emphasis supplied.)

CONCLUSION

Congress has indeed stopped short of approving the rule of apportionment of damages here urged, and we believe that it would be inappropriate for all the reasons stated in *Halcyon* for this Court to do so. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit should be reversed and the cause remanded to the District Court with appropriate instructions.

Respectfully submitted,

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Appendices

APPENDICES

November 9, 1978

CONGRESSIONAL RECORD

Extensions of Remarks

E5959

E5961

ACTIVITIES OF THE SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY FOR THE 95TH CONGRESS

HON. JOSEPH M. GAYDOS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Saturday, October 14, 1978

• Mr. GAYDOS. Mr. Speaker, the subcommittee on Compensation, Health and Safety, on which I am pleased to serve as chairman, conducted extensive legislative and oversight hearings during the 95th Congress on the various matters subject to its jurisdiction.

The subcommittee jurisdiction encompasses the following public laws:

Occupational Safety and Health Act of 1970 (Public Law 91-596);

Federal Mine Safety and Health Act of 1977 (Public Law 95-164);

Federal Employees' Compensation Act (Public Law 93-416); and

Longshoremen's and Harbor Workers' Compensation Act (Public Law 92-576).

The subcommittee, during 1977 and 1978, held 43 days of oversight hearings on the following laws within its jurisdiction:

First. Occupational Safety and Health Act of 1970—14 days;

Second. Longshoremen's and Harbor Workers' Compensation Act—17 days; and

Third. Federal Employees' Compensation Act—12 days.

Additionally, the subcommittee held 13 days of legislative hearings on the following bills within the subcommittee's jurisdiction:

First. H.R. 4287, Federal Mine Safety and Health Amendments Act of 1977—6 days;

Second. H.R. 4286, Youth Camp Safety Act—5 days; and

Third. H.R. 13461, Asbestos Related Disease Screening Act of 1978—2 days.

LEGISLATIVE ACTIVITIES

C. The Longshoremen's and Harbor Workers' Compensation Act

The subcommittee conducted field hearings at San Francisco, Calif., on June 24-25, 1977, and 15 additional hearings at Washington, D.C.

Witnesses testifying before the subcommittee included Members of Congress, and representatives of the recreational boating industry, stevedore organizations, shipbuilders, the insurance industry, State insurance departments, labor organizations, the offshore drilling contractors, the Offshore Marine Services Association, the Associated General Contractors, the Office of Workers' Compensation Programs of the Department of Labor.

The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1972. In addition to upgrading certain of the benefit provisions of the act, the jurisdiction of the act was extended from "navigable waters" to "adjoining areas."

Industry witnesses submitted the following criticisms:

First. Jurisdiction: It is alleged that the extension to "adjoining" areas leaves vague and unclear just what operations on land are covered. The small recreational boatyards, in particular, are in a state of uncertainty as to the status of their employees working at locations which are not geographically adjacent to navigable waters. The small boat and barge builders expressed concern about their employees who may be involved in nonmaritime construction during extensive periods of the year.

Second. Unrelated death benefits: The law provides that if a claimant receives compensation benefits for either permanent partial or permanent total disability and dies from any cause, his widow and/or survivors would be entitled to certain benefits. It is contended this has the effect of adding a life insurance policy to a workers' compensation law.

Third. Annual escalation of benefits: It has been contended that the unpredictability of future annual escalation of benefits makes insurance premium assessment equally unpredictable, resulting in higher insurance costs.

Fourth. No limitation on weekly benefits to widows and/or survivors in case of death: Since there is a maxi-

mum payable for total permanent disability, it is alleged that, in certain instances, a widow could receive higher benefits from the death of the employee than if he was receiving total permanent disability benefits.

Fifth. Procedure for establishing loss of wage-earning capacity: It has been stated that in some cases a claimant receives compensation in excess of his take-home wages prior to injury.

Sixth. Employers' access to an independent physical examination: It has been alleged that in certain district offices, the deputy commissioners are unwilling to order an independent medical examination at the request of an employer.

Seventh. Settlements: It has been alleged that the administrative law judges have no authority to approve settlements, which results in excessive litigation.

Assistant Secretary Elisburg testified as to the administrative problems in implementing the act, but stated he intends to substantially upgrade the administration of the act. Additionally, he informed the subcommittee that the Labor Department has authorized a study to conduct an indepth study of insurance rates and availability under the act.

I would like to take this opportunity to thank Members of Congress and others who have appeared as witnesses before the Subcommittee on Compensation, Health and Safety, and I would particularly like to thank members of the subcommittee who have been so cooperative throughout the 95th Congress. ●

Part A pertaining to Mine Safety and Health and Part B pertaining to the Federal Employees Compensation Act omitted as not relevant.

U.S. DEPARTMENT OF LABOR

Employment Standards Administration

Office of Workers' Compensation Programs
Division of Longshore and Harbor
Workers' Compensation

Washington, D.C. 20210

September 29, 1978

[SEAL]

No. 37

NOTICE TO INSURANCE CARRIERS, SELF-INSURED EMPLOYERS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND OTHER INTERESTED PERSONS

Subject: Maximum and Minimum Compensation Rates Under Longshore Act Effective October 1, 1978; Adjustments of Permanent Total Disability and Death Cases

Section 6(b)(3) of the Longshoremen's and Harbor Workers' Compensation Act provides that prior to October 1 of each year, based on the national average weekly wage for the three calendar quarters ending June 30 of that year, the Secretary of Labor shall determine the national average weekly wage to be applicable for the period beginning October 1 of that year and ending with September 30 of the next year. It has been determined that the applicable national average weekly wage for the period beginning October 1, 1978, and ending September 30, 1979, is $198.39.

Section 6(b)(1)(D) provides that for the period October 1, 1978 through September 30, 1979 the maximum rate

of compensation under this Act shall not exceed 200 percent of the national average weekly wage. The maximum compensation rate for total disability for injuries sustained during this period is $396.78 (200 percent of $198.39). Compensation for disability subject to this maximum should be paid at 66-2/3 percent of the employee's average weekly wage as determined under section 10, subject to the foregoing limitation.

The minimum compensation rate payable for disability incurred in the above period is $99.20 per week, fifty percent of the national average weekly wage. However, if an employee's average weekly wage is less than this amount, he or she receives the employee's entire average weekly wage as compensation for total disability.

In computing death benefits covered by this applicable period, the average weekly wage of the deceased employee shall be considered to have been not less than $198.39 per week, but total weekly benefits may not exceed the average weekly wage of the deceased.

The foregoing maximum and minimum rates do not apply to employees covered by the Nonappropriated Fund Instrumentalities Act. The maximum and minimum rates for those employees change under a separate schedule, whenever Federal employees' pay rates change.

In accordance with subsections 10(f) and 10(h)(3) of the Act, effective October 1, 1978 the compensation or death benefits payable for cases of permanent total disability or death which occurred prior to October 1, 1978 are to be increased by 8.05 percent, the percentage by which the national average weekly wage of $198.39 (effective October 1, 1978) exceeds the previous national average weekly wage of $183.61 (effective October 1, 1977 through September 30, 1978). The weekly compensation after adjustment is fixed at the nearest dollar, and no adjustment of less than $1 shall be made. In no

event is compensation for death benefits reduced. District Offices of the Office of Workers' Compensation Programs will advise beneficiaries receiving payments, and insurance carriers and self-insured employers of the amount of adjustment due in each case.

Field or district offices of insurance carriers or self-insured employers paying benefits under the Longshoremen's and Harbor Workers' Compensation Act and related Acts (the District of Columbia Compensation Act, the Defense Base Act, the Outer Continental Shelf Lands Act and the Nonappropriated Fund Instrumentalities Act) will soon receive specific instructions from the Office of Workers' Compensation Programs (OWCP) District Offices for making the adjustments under section 10(f) in individual cases, and should begin paying at the new benefit levels as soon as possible.

If the section 10(f) increase is to be reimbursed to an insurance carrier or self-insured employer under procedures which have been established by the OWCP National Office, it will be indicated on form Ltr. LS-521 (rev.) for that case with the "Yes" block being marked on the front of the letter. If the "No" block is marked, the Section 10(f) adjustment is not subject to reimbursement by OWCP. In case of questions about implementing these mandatory adjustments, any district office or the OWCP National Office may be contacted. (Phone: Area Code 202—523-8721)

/s/ John E. Stocker

JOHN E. STOCKER
Associate Director for
Longshore and Harbor
Workers' Compensation

Supreme Court, U. S.
FILED
DEC 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE, LIBERTY MUTUAL INSURANCE COMPANY

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TABLE OF CONTENTS

	PAGE
STATEMENT OF INTEREST OF AMICUS CURIAE	1
QUESTION PRESENTED	2
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. Under The Firmly Established Rule Of Both Maritime And Common Law, Each Tortfeasor Is Severally Liable For All Damages Recoverable By The Injured Person	5
II. This Court's Decision In *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), Has No Relevance Whatever To The Instant Case	7
III. The Legislative History Does Not Support Respondent's Interpretation Of The Statute	15
1. The Committee Hearings	15
2. The Committee Reports	22
IV. The Statutory Language Itself Does Not Support Respondent's Interpretation ...	25
V. Congress Could Not Have Intended To Limit Employers' Lien Recoveries As Well As Burdening Them With The Increased Cost Of Compensation Benefits	29
CONCLUSION	32

TABLE OF CITATIONS

Cases

Adkins v. I.T.O. Corporation of Baltimore, 433 U.S. 904	32

PAGE

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PAGE

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PAGE

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Smith v. M/V Capt. Fred, 546 F.2d 119 (5 Cir. 1977) 26

United States v. Reliable Transfer Company, Inc., 421 U.S. 397 (1975) 3, 4, 7, 8, 9, 10, 11, 14, 31

United States v. Wise, 370 U.S. 409 (1962) 9

The Washington and The Gregory, 76 U.S. (9 Wall.) 513 (1870) 6

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PAGE

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PAGE

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33 U.S.C. § 905(b) 1, 2, 4, 8, 25, 26, 28

33 U.S.C. § 933 ..... 27, 28

Miscellaneous

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Report No. 92-1125 of Senate Committee on Labor and Public Welfare 22, 23, 24, 28, 29

Report No. 92-1441 of H.R. Committee on Education and Labor 22

Brussels Collision Convention of 1910 11

IN THE

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OCTOBER TERM, 1978

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STANLEY D. EDMONDS,

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v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE, LIBERTY MUTUAL INSURANCE COMPANY

STATEMENT OF INTEREST OF AMICUS CURIAE

Liberty Mutual Insurance Company, *Amicus Curiae,* files this brief in support of the Petitioner pursuant to the written consent of the attorneys for the respective parties, dated September 22, 1978, and filed herein. Although this *amicus* was the workmen's compensation insurance carrier of the employer, neither it nor the employer desire to be, have been, or are parties to this action, it having been the consistent position of this *amicus* that under Section 5(b) of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") (33 U.S.C. § 905(b)) neither it nor

the employer can be forced to become parties. However, since in the Court below Respondent shipowner and *amicus* shipowner's group advanced arguments which, if accepted, could adversely affect the rights of this *amicus* and others similarly situated, this *amicus* feels compelled to use this means of explaining its views to this Court.

QUESTION PRESENTED

Does Section 5(b) of the LHWCA as amended in 1972 permit a reduction in a vessel owner's liability to an injured longshoreman where negligence of the vessel owner and of the stevedore company employer concur to cause the injury?

As applied to the facts of this case, the precise question presented is whether the longshoreman (Petitioner here) is entitled to recover from the vessel owner (Respondent) $20,000 or $90,000.

As of December 18, 1978, this *amicus* had paid out to or for the account of Petitioner statutory benefits in the total amount of $49,152.23. Payment of workmen's compensation continues at the rate of $184.07 per week. On the basis of established law, e.g., *The Etna,* 138 F.2d 37 (3 Cir. 1943); *Albert v. Paulo,* 552 F.2d 1139 (5 Cir. 1977), this *amicus* would be entitled to a lien upon Petitioner's recovery to the extent of the amount of benefits paid; but manifestly this cannot be effected here if the recovery is only $20,000. As the Court below noted (A60-61),[1] it could not pass upon the distribution of the fund because the employer was not (and could not be made) a party to the case.

It follows that this Court does not have before it the direct question of whether the employer/carrier must take a deduction from the lien or reimbursement on

[1] References are to the opinion below as it appears in the Appendix to the Petition for Writ of Certiorari.

account of the employer's negligence, a theory which shipowner's counsel, using the full power of suggestion, choose to call the "equitable credit".[2] That question is presented in an interpleader action brought by Respondent shipowner in the United States District Court for the Eastern District of Virginia, entitled *Compagnie Generale Transatlantique v. Stanley Edmonds, Liberty Mutual Insurance Company, and Nacirema Operating Co., Inc.,* Civil Action No. 78-413-N. This "credit", equitable or otherwise, is not before this Court except to the extent that it depends for its existence upon the proposition that the 1972 Amendments abrogated the long-established rule of maritime and common law known as the "joint and several liability" of each tortfeasor. In the instant case the question, more precisely, is one of "several" liability for, since the employer has a statutory immunity from tort liability to the employee, he is not a "tortfeasor" nor is his liability "joint". *American Mutual Insurance Co. v. Matthews,* 182 F.2d 332 (2 Cir. 1950); *Atlantic Coastline R.R. Co. v. Erie Lackawanna R.R. Co.,* 406 U.S. 340 (1972); *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.,* 417 U.S. 106, 115 (1974). As indicated above, the only question here is whether the Respondent is subject to such several liability. It is the position of this *amicus* that Respondent is so subject.

[2] See, e.g., Coleman and Daly, Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation under the 1972 Amendments to the Longshoreman's and Harborworkers' Act, 35 Md. L.R. 351 (1976). This article is a strong brief for the credit, long on "equitable" arguments and short on fundamental law. However, it distorts the legislative history of the Amendments (thereby contributing to the erroneous conclusion that Congress in 1972 intended to adopt by statute the proportionate fault rule promulgated by this Court for collision cases in 1975 in *United States v. Reliable Transfer Company, Inc.,* 421 U.S. 397). It almost totally disregards the basic legal question presented in the instant case as to whether the Amendments, with or without an enactment of proportionate fault, abrogated the rule of joint and several liability which is deeply embedded in both maritime and common law.

SUMMARY OF ARGUMENT

The 1972 Amendments to the LHWCA reconfirm the rule, well-established by decisions of this Court and statutory enactments, that in maritime personal injury cases the common law defense of contributory negligence gives way to a rule of comparative negligence whereby the Plaintiff's recovery is reduced in proportion to his own negligence. The Amendments do not, however, provide for the apportionment of fault between a negligent third party (whether vessel owner or otherwise) and a negligent employer covered by the LHWCA. Furthermore, the Amendments do not abrogate the well-established rule of maritime and common law that an injured person may recover his full damages from any *one* of multiple wrongdoers. The contrary position taken by the Court below is not supported by the statutory language itself or by the legislative history. This Court's decision in *United States v. Reliable Transfer, Inc.*, 421 U.S. 397 (1975), decided three years after the Amendments, has no relevance to their interpretation.

The Amendments have imposed an onerous financial burden upon employers while at the same time providing shipowners with new and effective defenses to suits by employees. Congress could not have intended further to unbalance the scales in favor of shipowners by relieving them of any portion of their traditional liability for the full results of their negligence while at the same time further burdening employers by reducing their potential lien recoveries. In any event, Congress has, for over a year, had under active study the functioning and impact of the 1972 Amendments and can be expected further to amend the language of Section 5(b) if it should find that the courts have thwarted its intent, as Respondent shipowner claims has been done by the Second, Fifth and Ninth Circuits and by several other district courts which have

ruled against shipowners. Petitioner and his supporting *amici*, on the other hand, contend that the Court below effectively rewrote the relevant statutory provisions.

ARGUMENT

I.

UNDER THE FIRMLY ESTABLISHED RULE OF BOTH MARITIME AND COMMON LAW, EACH TORTFEASOR IS SEVERALLY LIABLE FOR ALL DAMAGES RECOVERABLE BY THE INJURED PERSON.

No authority need be cited for the common law rule of several liability; even the Court below recognizes the viability of the doctrine (A56-57). Although it does not expressly so state, the Court's language strongly implies that it fails to understand that this is and always has been the rule of admiralty law as well. At three points in one paragraph and appended footnote, the Court refers to this as a "common law doctrine" or "common law principle" and even more pointedly refers to it (fn.2) as one of "the principles of land-based negligence law." Since the instant case involves an injury on navigable waters, it is governed by the substantive principles of maritime law, and the same rule applies both afloat and ashore. Had not the Court below indicated ignorance of this fact, it might have been sufficient for us merely to pass the point with references to two decisions of this Court which document our statement. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952); *Cooper Stevedoring Company, Inc., v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). In *Halcyon* a shipowner found 25% at fault was required to pay 100% of the longshoreman's damages. In *Cooper* this Court stated that the injured longshoreman could have recovered his full damages from either the shipowner or from another joint tortfeasor though each was found to have been 50% at fault.

These decisions are merely the latest in a long line extending back for more than 100 years. The question has arisen most frequently in cases of marine collision. In *The Washington and The Gregory,* 76 U.S. (9 Wall.) 513 (1870), suit was brought by a passenger injured in a collision against both the carrying vessel and the non-carrying vessel. *This Court held that he could recover his full damages from either.*[3] The same result has been reached in numerous cases of property damage resulting from collision. *The Alabama and The Gamecock,* 92 U.S. 695 (1876) (suit by innocent tow against its tug and other vessel colliding with tow); *Phoenix Ins. Co. v. The Atlas,* 93 U.S. 302 (1876) (suit by cargo on an innocent vessel against two other vessels each at fault); *The Chattahoochee,* 173 U.S. 540 (1899) (suit by cargo against non-carrying vessel for physical damage caused in collision with carrying vessel which was immune from direct suit); *Aktieselskabet Cuzco v. The Sucarseco,* 294 U.S. 394 (1935) (suit by owner of cargo against non-carrying vessel to recover for general average contributions paid to carrying vessel which was immune from direct suit).

Those being collision cases, contribution was of course allowed between the joint tortfeasors (each sharing equally). The important point is that as of 1972 not only was there joint and several liability, but there was stated to be no contribution at all except in collision cases. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra.* Indeed this was confirmed two years later for personal injury cases like this, i.e. those subject to the LHWCA, although the over-broad dictum in *Halcyon* was narrowed to the facts of the case. *Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra.* And

[3] Under English maritime law also the rule of joint and several liability in personal injury cases has been applied as at common law. See *The Bernina,* [1887] 12 P. 58 (C.A.), *aff'd* [1888] 13 App. Cas. 1 (H.L.).

the rule of proportionate contribution did not come until three years after the Amendments. *United States v. Reliable Transfer Co., Inc., supra.*

Beyond doubt, then, the rule of full liability for joint negligence has always been deeply imbedded in the law. The Court below, at the urging of the shipowners, has held that Congress by the 1972 Amendments abrogated this rule as to them. No contention can be made, however, that the statute contains clear language to that effect; and the Court noted that: "There is nothing explicitly enlightening in the legislative history." (A57, fn.2.) This situation squarely invokes the maxim that statutes in derogation of the common law must be strictly construed. This is particularly true where, as here, the construction contended for by Respondent would grant it a limitation of liability not heretofore recognized. *Robert C. Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297, 302-305 (1959).

As strictly construed, or indeed as liberally construed, the language of this statute does not support the radical new interpretation urged here. Consequently, Respondent's whole case collapses. It is not entitled to a "credit" of any kind, either against Petitioner's recovery, or against the insurance carrier's reimbursement for compensation benefits paid. Petitioner should have judgment for $90,000, and the District Court can then decide in the interpleader case what lien rights this *amicus* has.

II.

THIS COURT'S DECISION IN *UNITED STATES V. RELIABLE TRANSFER CO., INC.,* 421 U.S. 397 (1975), HAS NO RELEVANCE WHATEVER TO THE INSTANT CASE.

The Court below accepted the argument of Respondent and of *amici* shipowners that this Court's decision in *Reliable* establishing a rule of proportionate fault dictates that Respondent should be liable only for its

percentage of the total fault which contributed to Petitioner's injury. Injecting *Reliable* into an analysis of Section 5(b) of the 1972 Amendments involves a series of *non-sequiturs;*

1. It does not follow from a decision of this Court in 1975 that Congress would in 1972 have been influenced thereby.

2. It does not follow from the establishment by this Court of a proportionate fault regime in cases of property damage from collision or stranding (421 U.S. at 411) that Congress would have adopted such a rule in cases of personal injury covered by the workmen's compensation statute.

3. It does not follow from the establishment of a proportionate fault rule for the non-statutory general maritime law that this Court should impute the same intent to Congress in enacting legislation which purports to cover its field.

4. Even if Congress had intended to provide for proportionate fault as between shipowner and employer, it does not follow that it intended to abolish the doctrine of joint and several liability to third parties.

The shipowners pressed the Court below to apply to this case the decision in *Reliable Transfer.* We submit that their argument, which will presumably be repeated here, turns legal history upside down. Let us commence by laying out the precise holding in *Reliable:* in a collision or stranding where the two vessels (or a vessel and a shore station) are both at fault, their rights *inter sese* to recover for property damage are based upon proportionate fault rather than upon equal division. The case had nothing whatsoever to do with the liability of either to a third party, for either property damage or personal injury.

Since manifestly a 1975 decision could not have been written into a 1972 statute,[4] the Court below had to

[4] A statute must be construed in the light of events contemporaneous with, and not subsequent to, its enactment.

resort to the suggestion that in 1972 there was a "trend" to expand the doctrines of comparative negligence, citing *Reliable* (A58). Of course, state legislatures and Supreme Courts have been increasingly adopting rules abolishing contributory negligence as a complete defense and substituting a percentage reduction of recovery. See V. Schwartz, *Comparative Negligence* (1974) 1-29. Sometimes, but not always, provision is also made for contribution among joint tortfeasors; and sometimes, but not always, this is on a percentage basis. Whatever the "trend" may have been in automobile law, it was not reflected in American maritime law, at least before 1975, except of course that traditionally the plaintiff's contributory negligence in a case of personal injury or death merely reduced his recovery percentagewise. *The Max Morris,* 137 U.S. 1 (1890).

Because of the international nature of maritime law, it is significant that in England and continental countries there had indeed been a strong trend toward percentage apportionment of fault in all maritime cases, commencing in France in the 1870's and gaining its greatest momentum with the Brussels Collision Convention of 1910. See Owen, *The Origins and Development of Marine Collision Law,* 51 Tul. L.R. 759, 792-798 (1977). This marked difference between developments here and abroad prior to *Reliable Transfer* was the theme of numerous law review articles in which the authors decried the *absence* of any trend toward apportionment (except, of course, as between plaintiff and defendant in personal injury and death cases). See Huger, *The Proportional Damage Rule in Collisions at Sea,* 13 Cornell L.Q. 531 (1928); Sprague, *Divided Damages,* 6 N.Y.U.L. Rev. 15 (1929); Mole and Wilson, *A Study of Comparative Negligence,* 17 Cornell L.Q. 333 (1932); Staring, *Contribution and Division of*

See *United States v. Wise,* 370 U.S. 405, 411 (1962); *Fogarty v. United States,* 340 U.S. 8, 13 (1950).

Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304 (1957); Allbritton, *Division of Damages in Admiralty — A Rising Tide of Confusion,* 2 J. Mar. L. & Com. 323 (1971).

The writings of the two recognized admiralty scholars Staring and Allbritton are particularly notable because they wrote after *Halcyon* and before the 1972 Amendments. Staring referred (p. 340) to the absence of a proportional damage rule in collision cases as "the great anomaly of the maritime law applied in America today." Allbritton noted (p. 338) that "the courts have refused to adopt a theory that would assign percentages of fault among multiple defendants." As late as 1973 it was still being debated whether there was *any* right to contribution in non-collision cases; and there was no suggestion that, if so, it was on a percentage basis. See Allbritton, *Contribution Among Joint Tortfeasors in Non-Collision Maritime Cases,* 4 J. Mar. L. & Com. 425 (1973).

Reliable Transfer, of course, changed all of that in collision cases. Evidence was not long in coming thereafter that percentage apportionment among multiple defendants in non-collision personal injury cases might follow *Reliable.* See, e.g., *Griffith v. Wheeling Pittsburgh Steel Corporation,* 521 F.2d 31, 44, *cert. den.* 423 U.S. 1054 (1976). Before *Reliable,* however, there was no such "trend" in the maritime law. For these reasons, we submit, attempts to impute to the 1972 Congress an intent to adopt a rule of proportionate contribution are totally without justification.[5]

There is another more subtle reason why *Reliable Transfer* does not help the shipowners here. It stems

[5] As late as 1974, this Court specifically refrained from determining whether contribution among multiple defendants in such personal injury cases should be on an equal basis or on a percentage basis. See *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.,* 417 U.S. 106, 108, fn. 3.

from the language of the Brussels Collision Convention of 1910, the relevant provisions of which are as follows:

> "Art. 4. If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.
>
> The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties.
>
> In respect of damages caused by death or personal injury, the vessels in fault shall be jointly as well as severally liable to third parties, without prejudice to the right of recourse of the vessel which has paid a larger part than that which in accordance with the provisions of the first paragraph of this article she ought ultimately to bear." 6 *Benedict on Admiralty* (7th ed. 1969) 39.

This Court in *Reliable Transfer* quoted from Article 4 of the Convention (421 U.S. at 403) and ultimately (id. at 411) stated its holding in language virtually identical with that of the Convention. The same Article contains a provision for personal injury and death claims and specifically preserves the rule of joint and several liability, subject, of course, to the right of contribution proportionate to fault. See Brandon, *Apportionment of Liability in British Courts under the Maritime Conventions Act of 1911,* 51 Tul. L. Rev. 1025, 1028 (1977).

The point is that a rule of joint and several liability is perfectly compatible with a rule of proportionate fault. Thus, even if Congress had spelled out in the 1972 Amendments a proportionate fault rule, shipowners would have remained severally liable to employees *unless the statute had also expressly abolished several*

liability, which of course it did not do. This has been the result in every case in which the question has been presented. Schwartz, *Comparative Negligence* (1974) at 253; *American Motorcycle Ass'n v. Superior Court,* 20 Cal. 3d 587, 146 Cal. Rptr. 182, 578 P.2d 899, an *en banc* decision of the Supreme Court of California in 1978. Coming from the court which is widely known for its advancement of new tort theories, this decision is sufficiently illustrative for our purposes and merits full quotation (20 Cal. 3d 586-590, 146 Cal. Rptr. 187-190, 578 P.2d 904-907):

> "Under well-established common law principles, a negligent tortfeasor is generally liable for all damage of which his negligence is a proximate cause; stated another way, in order to recover damages sustained as a result of an indivisible injury, a plaintiff is not required to prove that a tortfeasor's conduct was *the sole* proximate cause of the injury, but only that such negligence was a proximate cause.
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> * * * *
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> In the concurrent tortfeasor context, however, the 'joint and several liability' label does not express the imposition of any form of vicarious liability, but instead simply embodies the general common law principle, noted above, that a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a recovery for his injuries; the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused.

> * * * *
>
> As we have already explained, a concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury. In many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself, to cause the entire injury; in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting alone, would have caused the same injury. Under such circumstances, a defendant has no equitable claim vis a vis an injured plaintiff to be relieved of liability for damage which he has proximately caused simply because some other tortfeasor's negligence may also have caused the same harm. In other words, the mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.
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> * * * *
>
> Indeed, although [co-defendant] fervently asserts that the joint and several liability concept is totally incompatible with a comparative negligence regime, the simple truth is that the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine. As Professor Schwartz notes in his treatise on comparative negligence: 'The concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question.' [citation omitted]. [*Co-defendant*] *has not cited a single judicial authority to support its contention that the advent of comparative negligence rationally compels the demise of the joint and several liability rule. Under the circumstances, we hold that after Li* [the California case establish-

ing comparative negligence], *a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.'*" (Italics supplied)

The post-*Reliable* personal injury and death cases have continued to apply the rule of joint and several liability while apportioning fault among defendants. *Hogge v. SS Yorkmar,* 434 F. Supp. 715, 728 (D. Md. 1977);[6] *Linehan v. United States Lines, Inc.,* 417 F. Supp. 678, 694-695 (D. Dela. 1976), *mod.* 559 F.2d 1208 (3 Cir. 1977); *Fathom Expeditions, Inc. v. M/T Gavrion,* 402 F. Supp. 390, 393-394 (M. D. Fla. 1975); Vickery, *Special Problems of Personal Injury or Death Arising Out of Collision Disaster Cases,* 51 Tul. L. Rev. 896, 932-935 (1977).

Reverting now to *Reliable* and the Collision Convention, we draw the Court's attention to the second paragraph of Article 4 which provides for damage to cargo and other property. In this instance the joint and several liability rule is expressly abrogated, thus expressing in eight clear words what the shipowners here contend that Congress *implied* in the 1972 Amendments. Thus the Convention satisfied Professor Schwartz's criterion that the concept of joint and several liability is retained under a proportionate fault regime "unless the statute specifically abolishes it". *Comparative Negligence* at 253. The ultimate proof of the continued, complete viability of the joint and several liability rule in American maritime law appears in the post-*Reliable* decisions to the effect that this

[6] *Hogge* is particularly in point because there one of the defendants was permitted to limit its liability, thus presenting a situation analogous to statutory immunity (as in the instant case), bankruptcy, inability to effect service of process, etc., all of which bring the joint and several liability rule into sharp focus.

Court did not adopt this section of the Convention, did not overrule the *Chattahoochee, supra,* and did not abrogate the joint and several liability rule even in cases of damage to innocent cargo. See Kasanin, *Cargo Rights and Responsibilities in Collision Cases,* 51 Tul. L.R. 880, 888 fn.63 (1977); Owen, *supra,* n.3, at 797-798, 804-806; and cases cited in said articles plus *Complaint of Flota Mercante Grancolombiana, S.A.,* 440 F. Supp. 704, 724-725 (S.D.N.Y. 1977).

III.

THE LEGISLATIVE HISTORY DOES NOT SUPPORT RESPONDENT'S INTERPRETATION OF THE STATUTE.

1. *The Committee Hearings*

During May and June, 1972, the Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate (92d Cong. 2d Sess.) held hearings on S. 2318, S. 525, and S. 1547 (843 pages) (hereinafter cited as *Senate Hearings*). Thereafter, in June and July, 1972, the Select Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives (92d Cong. 2d Sess.), held hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (332 pages) (hereinafter cited as *House Hearings*). From these hearings emerged the 1972 Amendments. Consequently, it is essential to search this public record for any evidence of the now alleged Congressional intent to limit the liability of shipowners, in suits by covered employees, to the shipowners' percentage of the total fault contributing to the injuries.

Not even shipowners now contend that the hearings provide any direct evidence to support their position. This is perhaps not surprising in view of the fact that shipowners took no part in the hearings. A great many witnesses testified and/or submitted written statements, the total of which comprises 1,175 pages. These

were Senators and Congressmen, representatives of the Department of Labor, representatives of labor unions, representatives of bar associations of plaintiffs' attorneys, employers of all types of waterfront labor and their associations and committees, and insurance carriers of such employers. Conspicuous by their absence were representatives of shipowners, shipowner associations, and shipowners' insurance underwriters. In view of the subsequent controversy raised by shipowners as to the impact of the Amendments upon their rights and defenses (as exemplified by this case), it would seem logical to find in the hearing record some proposal by shipowners of the positions which they now espouse. This would have added some credibility to their present contentions as to the intent of the two Committees. Conversely, their failure to participate in the legislative process, while in no way subject to criticism, does make it impossible for Respondent and its supporting *amici* to track their contentions back to the legislature.

In this connection, there is relevance in the remark of the lower court: "Before 1972 the exposure of ships to liabilities for injuries to longshoremen was comparatively slight except insofar as reparations for such injuries occasioned higher stevedoring costs." (A52). Unquestionably the exposure of employers was "comparatively" much greater than that of shipowners. But, if the latter's exposure was only "slight", there can be no presumed intent on the part of Congress to legislate a radical new defense in favor of shipowners. Rather, the logical inference from this is that Congress intended to protect employers by fortifying their rights and defenses as set forth in the then-existing statute. Thus, the quoted statement of the Court below is inconsistent with its own conclusion and actually supports the position taken in this brief.

The key to the whole situation was the overruling of *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956), and the statutory restoration of the employer's "exclusive liability" under Section 5 of the Act. If the employer could be relieved of the *Ryan* burden, he could agree to higher benefits. (Benefits had not been increased since 1961 because employers could not afford the double exposure.) Given higher benefits, employees could relinquish their rights to recover from shipowners for unseaworthiness awarded them in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946). The hearings were devoid of any sentiment for improving the shipowners' position as such (or for weakening it either) — only for abolishing their liability to harbor workers for unseaworthiness, which would in turn make it feasible to overrule *Ryan,* which would in turn break the impasse between employers and employees.

The record is replete with examples of such testimony, of which that of the lead-off witness, Secretary of Labor Hodgson, is typical. *Senate Hearings* 28-31. The AFL-CIO representative referred to "circular liability" as being "the big problem at this point". *House Hearings* 284. A leading representative of stevedores called it "the most serious problem in the longshore industry" which "commands paramount consideration before any decision can be reached regarding improvement in the benefits of the Longshore Act". *Senate Hearings* 277. A representative of an *ad hoc* committee of all the major port associations of the United States said that "the longshore compensation system is in crisis, a crisis that is steadily worsening. This crisis is caused by the proliferation of 'third party' or 'circular liability' law suits". *Senate Hearings* 724. A representative of west coast stevedores said: "The steadily increasing incidence of third party suits is, to my mind, at least, the most alarming and threatening problem facing our industry." *Senate Hearings* 632.

Thus, the current argument for improving the position of the shipowner *at the expense of the employer* is diametrically opposite to the purpose and intent of Congress. The Committees were thoroughly aware of such rights and defenses as employers then retained under the existing law. First, they knew that the shipowner could not get contribution from the employer on any basis, percentage, equal, or otherwise, because this Court had said so in *Halcyon* (specifically cited by a witness representing plaintiffs' trial lawyers, *House Hearings* 152). Secondly, they knew that the employer was entitled to a lien on the employees' recovery to the extent of *all* statutory benefits theretofore paid. *Senate Hearings* 30 (Secretary Hodgson), 354; *House Hearings* 48 (Secretary Hodgson), 119, 135, 158. They also knew that a reduction of the employers' lien would be "the substantial equivalent of contribution" because this Court had said so. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 412 (1953). This Court had also made this clear in *Halcyon* when it reversed the decision of the Court of Appeals granting the shipowner "an equitable adjustment" against the lien. *Baccile v. Halcyon Lines,* 187 F.2d 403, 405 (3 Cir. 1951).

The hearing record demonstrates that the objective was not, as Respondent here argues, to give the negligent shipowner a new defense to the employees' claim to damages and to the employers' claim to a lien, when the employer was also negligent. The objective was to guarantee such rights and defenses as the employer then had under the statute and under *Halcyon* and *Pope & Talbot.* In particular, the need was to protect the employer from the "end around play" of *Ryan.*[7] This culminated in the new protective language of Section 5(b) which insured that the shipowner would

[7] See, e.g., *Senate Hearings* 28-31, 174, 190, 209, 258-292, 621-625, 626-631, 632-639, 640-642, 657, 661, 722-748, 785-786, 791-792. *House Hearings* 47-50, 71, 81-86, 91-93, 243.

have no right of indemnity or contribution "directly or indirectly" and that the employers' right of full lien reimbursement would be guaranteed. This would fully implement *Halcyon* and *Pope & Talbot,* would eradicate the *Ryan* doctrine, would solve the problem of circular liability, and would clear the way for an increase in benefits to the employees.

Various suggestions were made with respect to third party suits against shipowners. At one extreme, the Administration, through Secretary Hodgson, proposed abolishing them entirely, whether based upon unseaworthiness or negligence (*Senate Hearings* 38; *House Hearings* 50), as did a prominent representative of stevedores. *Senate Hearings* 273, *House Hearings* 117-118. At the opposite extreme representatives of plaintiffs' lawyers advocated leaving them intact as under *Sieracki. Senate Hearings* 354, 370-372; *House Hearings* 136. A representative of the shipyard industry, Ralph K. Hartman, advocated the middle ground of abolishing suits for unseaworthiness but preserving to employees the right to recover for negligence. *Senate Hearings* 174-175, 188-191, 206-210; *House Hearings* 71-72, 78-79. This was accepted enthusiastically by both Committees (*Senate Hearings* 174-176; *House Hearings* 72, 79) and ultimately became the new Section 5(b).

This raises the key question of whether in the course of these 1,175 pages of testimony there was any discussion of how to handle the situation where both shipowner and employer were negligent. The logical place to commence this search is in Mr. Hartman's testimony. In fact, he made no reference whatsoever to apportioned fault or damages, as is evident from a full quotation of the relevant portion of his testimony (*House Hearings* 71):

> "I will not summarize the rights of injured seamen, longshoremen, and ship repair yard workers except to say there is a logical basis for the

granting of immunity to a shipowner subjected to a liability due to an unseaworthy condition solely created by a stevedore or ship repair yard contractor. In these cases, the circuity of action arises with the result that the stevedore and ship repair yard contractor have a dual liability.

Clearly this is a situation that is contrary to the original intent of the exclusive remedy provisions of the Longshoremen's Act, and, because of the greatly added burden it places upon stevedores and ship repair yard contractors, should be corrected.

On the other hand, there do not appear to be any compelling reasons to eliminate the rights and remedies of longshoremen and ship repair yard workers when injured as a result of the negligence of shipowners.

To abrogate this right, without the longshoremen or ship repair yard workers receiving a quid pro quo from the responsible third party, would, I suggest, be morally wrong and may raise a question of possible violation of the due process clause of the Constitution.

The reestablishment of the exclusive remedy provision of the act can, with due regard for our employees, be accomplished by removing the warranty of seaworthiness as a basis for determining the liability of ships and shipowners (other than in claims by crewmembers), as was proposed in H.R. 207 in 1961, a copy of which is attached hereto.

The provisions in that bill had the effect of retaining all the injured workers' traditional remedies except for the seaworthiness warranty as applied to longshoremen and ship repair yard workers (in itself a remedy which had not existed prior to 1946), and removing, for practical purposes, the dual liability of stevedores and ship repair yard contractors.

It is suggested that the intended and sorely needed relief can be accomplished by an amendment conforming to H.R. 207."

This statement also appears at *House Hearings* 78-79 and *Senate Hearings* 174, 190-191, 209-210. It is manifest from Mr. Hartman's use of the words "solely created by a stevedore", appearing five times in the record, that he was suggesting the elimination of the *vicarious* liability of shipowners for the acts or omissions of employers. The converse seems equally clear, namely, that he would retain the *full* liability of shipowners for their *own* acts or omissions, as prescribed by established case law, notably *Halcyon*. The "quid pro quo" to which he referred was the preservation of the negligence cause of action in consideration for the elimination of vicarious liability.

Only one witness raised the question of apportionment as between shipowner and employer, this being Mr. David B. Kaplan, representing the American Trial Lawyers Association, whose members represent plaintiffs in personal injury suits. *Senate Hearings* 354-355, 373, 377; *House Hearings* 136-137, 148. Mr. Kaplan's suggestion was, however, made in a context entirely different from that now existing. His proposal was to retain *Sieracki* and the shipowner's absolute liability for unseaworthiness, *including* his vicarious absolute liability for the acts of the stevedore. He would then have allowed the shipowner to get contribution from the stevedore to the extent of the latter's negligence. In effect, Mr. Kaplan would have retained *Sieracki* and overruled both *Ryan* and *Halcyon*.

The Kaplan suggestion was given short shrift in both Committees and never reappeared in the hearings or in the Committee reports. Senator Eagleton, conducting the Senate hearings, dismissed the suggestion as being contrary to the whole "concept of workmen's compensation". *Senate Hearings* 355. In the House Committee the Kaplan suggestion was, paradoxically, criticized by another representative of the plaintiffs' bar because it "alters the compensation scheme and that really what

the stevedore was promised under the Longshoremen's and Harbor Workers' Act was exclusive liability for damages to one of its own employees." *House Hearings* 152. That was the last heard of apportionment in any form between shipowners and employers.

2. *The Committee Reports*

The Senate and House Committees produced Reports which are identical in most respects. The Senate Report is No. 92-1125, reprinted in relevant part as an appendix to Petitioner's brief. The House Report is No. 92-1441, reprinted in 6 U.S. Code Cong. & Ad. News, 92d Cong. 2d Sess., at 4698. This Court has demonstrated the usefulness of these Reports. *Northeast Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977).

The Respondent and its supporting *amici* read the Reports as providing for apportionment of fault between shipowner and employer. Two general comments can be made in reply. First, it is inconceivable that the Committees would be thus recommending legislation which radically altered existing law without any discussion thereof in the lengthy hearings (except only for the Kaplan testimony discussed *supra*). Secondly, Respondent's interpretation is made possible only by taking various statements of the Committees completely out of context.

For example, Respondent argues that the Committees specifically adopted "comparative negligence". While the Reports do use the phrase (*Senate Report* 12), it is perfectly obvious that what is meant is the comparative negligence of plaintiff and defendant shipowner. In fact, the remainder of the same sentence so states. The context is not one in which the relationship of shipowner and employer is at issue.[8] The "admiralty

[8] The phrase "comparative negligence" properly refers to a comparison of fault between plaintiff and defendant, not between co-defendants or others. V. Schwartz, *Comparative Negligence* (1974); Prosser, *Comparative Negligence,* 51 Mich. L. Rev. 465 fn.2 (1953).

concept of comparative negligence" referred to was that represented by *The Max Morris, supra,* which was in 1972 the only form of comparative negligence known to the American admiralty.

Other statements in the Reports are lifted out of context, notably this one: "The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore". *Senate Report* 11. If the Committees had been speaking in terms of percentage apportionment, they could easily have said so. Even the simple phrase "to the extent that the stevedore is negligent" would have done it. On the contrary *what they were talking about was the vicarious liability of the shipowner for the acts of the stevedore in causing the unseaworthy condition or bringing it into play.* In fact, the Reports expressly so state. *Senate Report* 9. This is entirely consistent with the testimony at the hearings referred to, *supra,* particularly that of Mr. Hartman, which developed the concept that the shipowner should remain liable for his own acts or omissions as at common law but should not be liable vicariously for those of the stevedore.

The Reports make this perfectly clear by citing a long list of cases in this and the lower courts in which shipowners were held "liable in damages for acts or omissions of stevedores" in causing or bringing into play a condition of unseaworthiness. *Senate Report* 10. Two of them are worthy of special mention. In one the unseaworthy condition was caused by the shipowner's negligence and brought into play by the stevedore's negligence. *Crumady v. The J. H. Fisser,* 358 U.S. 423 (1959). Had the Committees been disposed to apportion fault, this would have been a perfect example. In

another case cited the shipowner was held liable for unseaworthiness resulting from a *non-negligent* act of the stevedore. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). There was no room for apportionment there; in fact it represented the ultimate in vicarious liability. The Committees proposed simply overruling all of these cases, suggesting no middle ground such as apportionment of fault.

Our conclusion is supported by the repeated references to making shipowners liable "just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." *Senate Report* 8, 10, 11. (This language can be traced back directly to Senator Javits and the Minority Labor Counsel, who likened the situation to one on a building construction site. *Senate Hearings* 38, 175-176, 272-274, 656.) The use of land-based law as a measure has two facets. First, it imported a new standard of care into third party stevedore actions. Secondly, it reconfirmed that the common law principle of joint and several liability would apply on a vessel as on a construction site. The dissenting judge below thought this important (A64).

Whether articulated or not, the burden of Respondent's argument is that the 1972 Amendments overruled, not only *Sieracki* and *Ryan*, but also *Halcyon* and *Pope & Talbot*. Fortunately the Committee Reports carry their own refutation of such an argument in that they carefully list the cases which were intended to be overruled, namely *Sieracki (Senate Report* 8), *Ryan* (p. 9), and *Crumady, et al.* (p. 10). Neither *Halcyon* nor *Pope & Talbot* was included in the list, although they had both been cited in the hearings.

IV.

THE STATUTORY LANGUAGE ITSELF DOES NOT SUPPORT RESPONDENT'S INTERPRETATION.

The lower court's misreading of the statute can be pin-pointed in one phrase which it used four times: the shipowner is liable "to the extent" of its negligence (A. 55, 56, 57, 58). Obviously such language as that would call for apportionment, but the fact is that Congress did not use these words. They were injected by the Court for the purpose of expressing its own conclusion and have no probative value.

Respondent cannot point to any language in Section 5(b) which on its face calls for apportionment, and the Court below made no attempt to point out any such direct support for its position. In lieu of such supporting language the Court merely resorted to an exercise in semantics by reasoning that the first and second sentences of Section 5(b) are irreconcilable except in terms of apportioned negligence. We suggest that this is a slender reed upon which to base the Court's decision, and the dissenting judge refused to accept it (A. 64-66). He read the second sentence as stating simply that "the plaintiff may not base his claim against the shipowner upon the negligence of the stevedore." (A. 65). This merely expresses the negation of vicarious liability which we have traced in detail through the hearings and the Reports. See *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 40 (3 Cir. 1975), *cert. den.* 423 U.S. 1054 (1976).

Actually, the short answer to the Court's interpretation is that the second sentence (and third sentence) were included in the statute to cover a situation not involved in the instant case. This is made plain in the paragraph of the Report commencing at the bottom of page 11 and carrying over to the top of page 12. This Court had held in *Reed v. SS Yaka*, 373 U.S. 410 (1963), and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371

(1967), that a longshoreman could sue his employer for unseaworthiness of the vessel where the employer was both shipowner and stevedore. Mr. Justice Harlan, dissenting with Mr. Justice Stewart, thought that this repealed the "exclusive remedy" provision of Section 5 (373 U.S. at 416). On the other hand the decision prevented inequity to a longshoreman who happened to work for a stevedore loading his own vessel. The Committees resolved this dilemma by preserving the right to sue a shipowner-stevedore for the negligence of his employees not engaged in stevedoring as, for example, members of the crew, shore-based personnel, etc.

The second and third sentences, therefore, were intended to narrow the scope of recovery in a *Yaka* situation, while preserving its broad outlines. This has been the result in all but one of the reported cases.[9] In the instant case the shipowner and stevedore are entirely independent, and therefore the *Yaka* problem is not involved.

The lower court does not mention the one provision of Section 5(b) which deals with the present situation. The decision below reduces the plaintiff's recovery from $90,000 to $20,000. Since the insurance carrier (this *amicus*) has a lien on the recovery of $49,152.23 (as of December 18, 1978), the Court's decision reduces the carrier's reimbursement by $29,152.23. In other words the carrier is called upon to *contribute* $29,152.23 to the shipowner who is saving $70,000. It is our position that

[9] *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 40-44 (3 Cir. 1975), *cert. den.* 423 U.S. 1054 (1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2 Cir. 1976); *Smith v. M/V CAPT. FRED*, 546 F.2d 119, 122-123 (5 Cir. 1977); *Complaint of Allied Towing Corp.*, 416 F. Supp. 1207 (E.D. Va. 1976), *aff'd* 580 F.2d 702 (4 Cir. 1978); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402, 409 (E.D. La. 1975); *Contra: Baker v. Pacific Far East Line, Inc.*, 451 F. Supp. 84 (N.D. Cal. 1978) (holding *Yaka* overruled completely).

this ruling is contrary to the statutory language: "* * * the employer shall not be liable to the vessel for such damages directly or indirectly * * *." Professor Robertson supports this position in his article *Jurisdiction, Shipowner Negligence and Stevedore Immunities Under the 1972 Amendments to the Longshoremen's Act*, 28 Mercer L. Rev. 515, 542 (1977):

> "As indicated above, it ought to be completely clear that, aside from the peculiar situation of the stevedore who is also a shipowner, all forms of tort recovery against stevedores on account of longshoremen's injuries are foreclosed by the 1972 amendments. The prohibition in § 905(b) against any liability of the stevedore to the shipowner 'directly or indirectly' should be fully understood to mean that the negligent shipowner is to bear the full tort liability to the injured longshoreman, subject only to a diminution by plaintiff's negligence, and that there is no way for all or part of that liability to be shifted on account of any negligence of which the stevedore may have been guilty."

Directly in point here is this Court's decision in *Pope & Talbot, supra*, 346 U.S. at 412, which termed a reduction of the lien "the substantial equivalent of contribution". This remains good law.[10]

The LHWCA contains other evidence of Congressional intent not mentioned by the Court below. It has to do with third party actions against others than shipowners. From 1927 to 1972 the statutory basis for all third party actions was Section 33, which was not amended in any relevant respect in 1972. In that year Section 5(b) was added to cover specifically actions

[10] *Lopez v. A/S Svendborg*, 581 F.2d 319, 325-326 (2 Cir. 1978); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725 (2 Cir. 1978); *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 760 (2 Cir. 1975), *cert. den.* 423 U.S. 1053 (1976); *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669, 673 (9 Cir. 1975), *cert. den.* 425 U.S. 944 (1976); see *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 888 (5 Cir. 1978).

against "a vessel," as defined in Section 2(23), but which we have loosely called a "shipowner."

The Court below purports to find in 5(b) a formula for apportionment of fault between employer and shipowner. Yet no one has ever contened that 33 provides for apportionment between employer and *other* types of third party tortfeasor. This is illogical. There is no apparent reason for treating shipowners and non-shipowners any differently. In fact, it would be contrary to the legislative intent to grant to negligent shipowners a limitation of liability to injured employees not granted to non-shipowners.

Congress had the stated "objective of encouraging safety". *Senate Report* 10. Such a grant to a negligent shipowner would immunize him from liability for the full damages resulting from his negligence while exposing the non-shipowner to full liability no matter what the percentage of his fault. Yet Congress must have thought that, of all types of third parties, it is the shipowner who should be given the incentive to maintain safety on shipboard. In fact, the Committees said that "the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work" (p. 10). In other words Congress intended to subject all third parties to the same rules, whether sued under Section 5(b) or Section 33. This meant the same standard of care *and the same rule of full liability.* Otherwise shipboard safety might be compromised.

As previously indicated, suggestions were made at the hearings that shipowners should be entirely immune from suit (and subject to workmen's compensation liability), while negligence suits against other third parties would be preserved. *House Hearings* 87. The Committees rejected the suggestion and undertook to treat them all alike. *Senate Report* 8. It follows that if there is no apportionment under Section 33, there can be none under Section 5(b).

The decision of the Court of Appeals has already led to a situation in the Fourth Circuit which thwarts the purpose of the Amendments to guarantee the employer an "exclusive remedy" in return for higher benefits. The Court below said that "the stevedore might be made a party plaintiff" so that his lien rights could be adjudicated. A. 61. In other words, stevedores would be "subject to additional law suits," which is precisely what the Congress said should not be done. *Senate Report* 4.

Attorneys for shipowners in Baltimore and Norfolk have been filing motions to require the joinder of employers and their insurance carriers at the inception of the litigation. E.g. *James R. Butler v. Eucharis Shipping Corp.*, Civil Action No. 78-431-N in the Eastern District of Virginia, Norfolk Division; *Stanley M. Wetters v. Moore-McCormick Lines, Inc.*, Civil Action No. H-77-858 in the District of Maryland. In the latter case the District Judge entered an order summarily granting the motion, and the employer is now a party to "tripartite litigation" again despite all that Congress said in 1972. This exposes the fundamental error in the decision below.

V.

CONGRESS COULD NOT HAVE INTENDED TO LIMIT EMPLOYERS' LIEN RECOVERIES AS WELL AS BURDENING THEM WITH THE INCREASED COST OF COMPENSATION BENEFITS.

Respondent has argued that Congress intended to give employers an added financial inducement to promote safety by limiting their lien recoveries where their negligence contributed to injuries. This shows considerable ignorance of the cost of waterfront safety (or lack thereof) and workmen's compensation. The LHWCA itself furnishes all the financial incentive necessary to promote safety. It is the employer (and his carrier) who pay first and pay most, no matter who was negligent. Lien recoveries in third party suits are a

small factor in the equation. This has been particularly true under the 1972 Amendments because the Courts of Appeals have taken a very strict view of the negligence standard to be applied against a shipowner. The shipowner has been extremely successful in defending such suits, using the conservative language of the Reports as a defense.[11] Congress intended this result.

This is what the shipowner got out of the "trade-off" referred to by the Court below. A57a. He was given good defenses when he was not negligent, not a new limitation of liability when he was negligent. Congress simply had no reason to give the shipowner any other benefits even if he had asked for them, which, as we have noted above, he did not do.

When it came time in 1972 to add to the employer/carrier's financial burdens, Congress set Ossa upon Pelion. The brief of *amicus* National Association of Stevedores lists the increased benefits under the Amendments. Just as an example, the maximum weekly payment had theretofore been $70; it is now $396.78, with a built-in escalation for annual inflation increases.

During 1977 and 1978 the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor of the House of Representatives, 95th Cong., 1st Sess., has been conducting Oversight Hearings on the LHWCA. (Part 1 (953 pp.) has been printed, and Part 2 is expected shortly.) The waterfront industry covered by the LHWCA has been in a state of financial crisis as a result of the additional costs imposed by the 1972 Amendments[12] and the unavailability of insurance because the risks are largely uninsurable.[13]

[11] E.G. *Anderson v. Iceland Steamship Co.*, (1 Cir. 9/29/78) (not yet reported); *Munoz v. Flota Mercante Grancolombiana*, 553 F.2d 837 (2 Cir. 1977); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3 Cir. 1977); *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072 (4 Cir. 1978); *Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5 Cir. 1977); *Wescott v. Impresas Armadoras, S.A.*, 564 F.2d 875 (9 Cir. 1977).

[12] An insurance expert testified, for example, that the widow of a deceased employee, who might have died from causes unrelated to his injury, could receive death benefits of nearly $2,500,000 by age 77. *Oversight Hearings* 489.

Reference to these volumes, and to the two recent newspaper articles printed as an Appendix to this brief, will show two things. First, to the extent Congress intended to promote safety by increasing employers' financial burdens, it was overkill; there was no need to resort to any "credit" against lien recoveries to accomplish this purpose. Secondly, Congress is currently and actively surveying the operation of the 1972 Amendments and can be expected further to amend the Act if it believes that an apportionment formula should be added.

It is the position of this *amicus* that since Congress undertook to cover the whole field in 1927, and to cover the specific subject of the employer-shipowner relationship in 1972, the establishment of a proportionate fault rule is a matter for Congress to prescribe in clear language, if that is what it wants. The Fourth Circuit majority has impatiently re-written the statute as it saw fit. All other courts have deferred to Congress. We ask this Court to do likewise. We note in passing that the situation here is unlike that in *Reliable Transfer, supra.*, where Congress had failed to accept the opportunity to legislate in the field of collision liability.

[13] Various witnesses testified that the risk is now so unpredictable that insurance is "prohibitively expensive and in some cases unavailable". P. 492. One stevedore executive showed letters from 23 insurance companies refusing to quote on his primary coverage. Pp. 462-481.

CONCLUSION

This Court has had only one previous occasion to consider the 1972 Amendments. *Northeast Terminal Co., Inc. v. Caputo, supra* (actually a group of cases we call *Caputo*). Although the issues there were different, the Court's method of analyzing the statute is adaptable here. In *Caputo* the Fourth Circuit claimed to have found in the Committee Reports evidence that Congress intended to adopt the "point of rest" rule for jurisdictional coverage. All other Circuits disagreed. In the instant case the Fourth Circuit claims to have found evidence of the proportionate fault rule as between shipowner and employer. All other Circuits disagree. In *Caputo* this Court, in reversing the Fourth Circuit (see *Adkins v. I.T.O. Corporation of Baltimore,* 433 U.S. 904) used language appropriate here. It rejected:

> "A theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent * * *." 432 U.S. at 278.

The decision below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
DEC 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO BRIEF OF AMICUS CURIAE, LIBERTY MUTUAL INSURANCE COMPANY

(Omitted due to Printer's Error)

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APPENDIX

JOURNAL OF COMMERCE
(New York)
December 8, 1978

LONGSHORE ACT SEEN HITTING INSURERS

By Alan F. Schoedel
Journal of Commerce Staff

Writing insurance under the controversial 1972 amendments to the U.S. Longshoremen's and Harbor Workers' Compensation Act has become a "monumental" and almost impossible task, a marine insurance seminar in Jacksonville, Fla., was told this week.

Claims brought under those amendments — which were intended to eliminate third-party suits by injured dock workers, but has not done so — increased by $50 million, or fourfold, in 1977, Leo Whelan, vice president of Marsh & McLennan, New York, told the one-day session. Marsh & McLennan and the Florida Junior College at Jacksonville sponsored the program.

It has been forecast that claims attributable to the 1972 amendments will aggregate from $2 billion to $3 billion, Mr. Whelan said. He charged that the U.S. Department of Labor, which administers the law — "it appears poorly" — takes no interest in the consequent problems of marine insurance.

As a result of the tremendous claims involved, the insurance industry itself is displaying a hands-off attitude toward writing coverage for waterfront industry.

Of the 310 companies cleared by the Department of Labor to write such insurance, at most 25, "and more likely only eight or ten," are actually doing so, Mr. Whalen said.

The 1972 amendments were intended to remove third-party actions, in which an injured longshoreman who

was collecting compensation under the act could sue the vessel involved for "unseaworthiness" and the ship in turn would sue the stevedore-employer of the dock worker to recover the amount of the claim. The act removed the "unseaworthiness" cause of action but increased compensation benefits by a large amount, broadened the physical area covered by the insurance, and left what Mr. Whalen called "a gray area" in defining just what a harbor worker was.

So liberal has the act become under the 1972 amendments that it is a "social welfare" and retirement program, giving injured workers guaranteed pay for life that is practically the same as their take-home would be if they worked, said the Marsh & McLennan executive. It has a built-in escalation clause to keep pace with national wage increases, and takes no account of what the worker might get in Social Security benefits or what his actual working life might be, he told the seminar.

Mr. Whalen said the problem of writing such insurance might be eased somewhat if the London market could be brought into the actions, but that is impossible under the law as it now is written. Marsh & McLennan is one of several marine insurance companies in the United States which are setting up affiliations with London marine insurance firms.

James Wilmers, vice president and general manager of Marsh & McLennan's office in Cincinnati, said the 1972 amendments coupled with the "very unfair" Jones Act provisions for liability have created a serious problem for the tug and barge industry in rivers and coastal waters of the United States.

Under some "extremely liberal" interpretations by the courts, he said, it is possible in some cases for a longshoreman to collect under the Longshoreman's and Harbor Workers' Compensation Act, and then sue a couple of years later for damages under the Jones Act. This is possible because a longshoreman injured while performing work normally considered that of a crewman can make claims as both a dock worker and crew member.

JOURNAL OF COMMERCE
(New York)
December 1, 1978

INLAND WATERWAY CHIEFS TO ISSUE WARNING

LONGSHOREMEN'S ACT SEEN IMPERILING PORT PROJECTS

By Stanley Mantrop

Journal of Commerce Special

Houston — Top-level inland waterway executives are planning to warn the new Congress in January that unless steps are taken to drastically overhaul the controversial Longshoremen's and Harbor Worker's Act that a large number of planned terminal and port projects will be imperiled and several small- and medium-sized shipyards will be forced out of business.

An industry survey made by **The Journal of Commerce** revealed that several groups are putting the finishing touches on submissions to the new Congress in January which call for total review of the compensation act on the grounds its portion of the total operating costs of the industry has risen to "alarming proportions."

The Inland Rivers Ports and Terminals Board chairman, Col. Milton Barschorf, said that on the Mississippi River and its tributaries alone, there are more than 60 ports and more than 1,100 terminals, many of them with expansion plans either under way or being studied, will be affected by the escalating compensation costs and other unrelated problems. He said his group is completing a submission to the new Congress to "take a long look at the situation" and at the things affecting its future growth.

Meetings Held

The terminal group has been meeting with representatives of the National Association of Stevedores, which represents shoreside employers at many deepsea and inland points, which also has added its voice to the gloomy outlook for port and terminal growth under the present act.

The group's executive director and general counsel, Thomas Wilcox, said he has the support of the major waterfront groups seeking Congressional relief, but he warns the opposition to any changes in the Longshore Act from the railroads and the Department of Labor is going to be formidable.

Mr. Wilcox said the bill for workmen's compensation costs has risen to more than 6 percent of gross income in many states which he said is "simply too high and a deterrent to expansion and investment."

The longshore group executive insisted that if many of those involved are to get any relief from a situation that has left some employers without insurance and others faced with going self-insured which financially they are unable to do, the act must be overhauled quickly.

"We are trying to convince Congress that a law the Chief Justice of the United States categorized as 'unclear as any statute could probably go' is changed," said Mr. Wilcox.

Because of the rising costs for insurance (when it's available), he said, as matters now stand over utilization and readily available expense benefits are creating an overtaxed and workable system, and "in light of that situation it is not too difficult to perceive that the Act and its myriad of problems are a deterrent to orderly port development."

One of Several Problems

Colonel Barschorf listed workmen's compensation problems as only one of several confronting the inland waterways next year, a period he looked forward to "with cautious optimism."

"The impact upon future growth of the inland waterways due to the pending imposition of user charges, the implementation of the President's announced water policies, and the preservation policies covering fish, plants and wild life, and archeological artifacts, has not yet been fully assessed and probably won't be for some time to come. He said "I do believe it's fair to say that the handwriting is on the wall and the overall outlook indicates a definite rein on our growth potential."

The stand of the terminal operators is supported by the barge operators, and those engaged in operating small and medium-sized shipyard facilities, of which hundreds dot the inland waterways as well as the sea coast.

The American Waterway's (AWO) Operators Inc.'s shipyard chairman, Herman Molsan, said the rising workmen's compensation costs are increasingly becoming a serious problem for the small- and medium-sized shipyards not only on the inland waterways but also at the ocean ports.

Their owners, he said, are finding themselves faced with a steadily shrinking insurance market because of the reluctance of the insurance industry to cover them under present conditions, including payment not only of rapidly-rising claims but also fraudulent ones.

Many have been left with no alternative but to seek self-insurance coverage in order to keep going, but the high cost of accomplishing this goal has left many operators considering closing up shop, said the AWO official.

Supreme Court, U. S.
FILED
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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AS AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
Statement of Interest of the Amicus Curiae	1
Argument	3
The Decisions Below	3
Terms Used	4
Questions Presented:	
The Shipowner is Liable in Full as a Joint Tort-feasor	4
The Language of Section 905(b)	7
Limitation of the Shipowner's Duty to Pay Full Damages Places a Financial Burden on the Employee Not Provided By the Act	10
Conclusion	15
Certificate	17

CITATIONS

Cases:

Re Allied Towing Corp., 580 F.2d 702 (4th Cir. 1978)	9, 10
Canizzo v. *Farrell Lines, Inc.*, 579 F.2d 682 (2nd Cir. 1978)	14
Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974)	7
Derby v. *Prewitt*, 12 N.Y.2d 100 (1962)	6
Dodge v. *Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975) cert. den., 425 U.S. 944 (1976)	12

PAGE

Graphic Arts Mutual Ins. Co. v. *Bakers Mutual Ins. Co. of New York,* —— N.Y.2d —— (N.Y. Court of Appeals, Nov. 2, 1978) 5

Griffith v. *Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975) 10

Jackson v. *Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967) 8, 10

Kelly v. *Long Island Lighting Co.,* 31 N.Y. 2d 25 (N.Y. Ct. of Appeals) 5

Landon v. *Lief Hoegh & Co.,* 521 F.2d 756 (2nd Cir. 1975), cert. den., 423 U.S. 1053 (1976) 12

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Marant v. *Farrell Lines, Inc.,* 550 F.2d 142 (3rd Cir. 1977) 13

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Samuels v. *Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir. 1978) 12, 13

Shellman v. *U. S. Lines,* 528 F.2d 675 (9th Cir. 1975), cert. den., 425 U.S. 936 12

U. S. v. *Reliable Transfer Co.,* 421 U.S. 397 (1975) ... 7, 15

Zapico v. *Bucyrus-Erie Co.,* 579 F.2d 714 (2nd Cir. 1978) 5

Statutes Cited:

PAGE

Longshoremen's and Harbor Workers' Compensation Act

33 U.S.C. § 901 et seq. 3, 4

§ 905 ..... 7, 8, 9, 11

Miscellaneous:

H. R. Rep. No. 1441, 92nd Cong., 2nd Sess. [1972] U.S. Code Cong. & Admin. News 8

Senate Hearings (pages 351-392 at 373) Before the Subcommittee on Labor on S. 2318, S. 525 and S. 1547, May and June, 1972 ..... 7, 13

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AS AMICUS CURIAE

Statement of Interest of the Amicus Curiae

The Association of Trial Lawyers of America is the successor to the American Trial Lawyers Association, a national bar association, consisting of more than 25,000 lawyers, primarily engaged in the practice of personal injury law and compensation law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are en-

gaged in an especially hazardous industry, recognized as having a special status both by legislation and generally in the courts of the land. All of the maritime workers, not members of the crew of vessels, have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortious series of cases which have attempted since 1972 to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance not only as to standards of liability, but whether injured parties and relatives of deceased workers will receive the damages to which they have been traditionally entitled. Only a broad interpretation of the Federal Act will protect these employees as Congress intended.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief Amicus Curiae.

Consent to file this brief has been sought from the parties herein, and the consent of petitioner and respondent has been received, as well as the consent of various friends of the Court.

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Argument

This case concerns an interpretation of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act ("The Act"), 33 U.S.C., § 901 *et seq.* Congress explicitly made changes in the 1927 Act and did not explicitly or implicitly change the prior law that a third party was fully liable even though a joint tortfeasor together with an employer, which in all cases (except where the employer was also a shipowner), had only the obligation to pay compensation to an employee. It is the position of Amicus Curiae that there being no explicit change in the Act, and none adverted to in the legislative history, that a third party is fully liable for a plaintiff's damages, less any contributory negligence, and if the employer is immune from suit by the third party by reason of the 1972 changes, the employer has a lien on the recovery (less possibly attorney's fees to the plaintiff's attorney).

The Decisions Below

Contrary to all the other Circuit Courts of Appeal, the Court below, after a determination of the proportionate fault of all actors (including a non-present employer) held that the injured plaintiff could recover from the third party only that percentage of his damages for which the third party was held, rather than his full damages less any contributory negligence. The position of the stevedore-employer and recovery of its lien was left in limbo with the implication that this also was to come out of the plaintiff-employee's truncated recovery.

The result was that the employee was held entitled only to 20% of his damages since he himself was held 10% contributorily negligent and the employer was found 70% at fault, although the latter was never a party to the

proceedings on liability and could not be under the provisions of the Act. In the aftermath of *Edmonds,* the employer has been brought back into litigation in district courts in the Fourth Circuit to determine the amount of the plaintiff's recovery now devoured by the lien.

Terms Used

In this presentation, various terms will be used. A stevedore is an employer of those who basically load and unload ships and are not members of the crew, attached to the ship. The longshoreman is the workman, employed by the stevedore.

The case under discussion involves the rights as among the longshoreman (the injured party), his stevedore employer and the shipowner.

Their rights are now determined by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C. Application of the Act concerns more than longshoremen since it covers a vast number of maritime workers in other trades, and others besides shipowners may be liable to suit as third parties.

The Shipowner Is Liable in Full as a Joint Tortfeasor

The symmetry of the Act as amended in 1972 keeps some of the elements of the Act as known since 1927 and specifically changed only two elements of the third party action.

Changes involved a withdrawal of the longshoreman's right to sue for unseaworthiness, and the relief given to the employer not to be impleaded by the shipowner or third party on an indemnity claim or a call for contribution.

Preceding the changes in the Act the third party was always liable as a joint tortfeasor for all the damages suffered by the employee (less the employee's comparative negligence), even where the other joint tortfeasor was the employer.

The rule universally applied was the common law rule that joint tortfeasors are those whose torts both contribute to an injury, and that each one is liable for the whole damages. Origins of the rule concerning joint tortfeasors are of course very old.

But as discussed in *Zapico* v. *Bucyrus-Erie Co.,* 579 F.2d 714, decided by the Court of Appeals for the Second Circuit, June 15, 1978, "When two or more persons' torts together cause injury, each is fully liable to the victim. Prosser, Law of Torts § 52, at 314 (4th ed. 1971)."

The common rule was recently expressed by the Court of Appeals of New York, its highest court, in *Graphic Arts Mutual Ins. Co.* v. *Bakers Mutual Ins. Co. of New York,* decided November 2, 1978, N.Y.2d. There the Court had before it a dispute on liability coverage between two insurance policies, but since the accident involved joint tortfeasors, one of which was immune from direct suit due to compensation coverage, the Court stated:

> "It is elementary that injured claimants may still choose which joint tortfeasors to include as defendants in an action and, regardless of the concurrent negligence of others, recover the whole of their damages from any of the particulars sued (see *Kelly* v. *Long Island Lighting Co.*, 31 N.Y.2d 25, 30; 2A Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶ 1401:04; McLaughlin, Practice Commentaries, McKinney's Cons. Laws of New York, Book 7B, CPLR 1404:1, p. 381."

This was the rule prior to the 1972 Amendment and was discussed in legislative hearings. Nothing in the new Act specifically changes this rule of law.

In *Derby* v. *Prewitt,* 12 N.Y.2d 100 (1962), the New York Court of Appeals had before it the effect of a release to a driver where the plaintiff had suffered a separate act of medical malpractice after the initial accident.

The Court said:

> "It is settled that a wrongdoer [i.e., the driver] is liable for all the proximate results of his own tortious act, including (in a case such as the present) the aggravation of the original injury caused by the negligence of the physician. [citing authorities]."

Derby v. *Prewitt* makes it clear that joint tortfeasors act in concert and contribute concurrently to the same wrong. This is differentiated from wrongs such as later malpractice which are "independent and successive." Such a text-book analysis was required to deal with the release issue in the case because, "[t]he ancient common law rule barred recovery against one joint tortfeasor if another had been released from liability", except where (under later law), rights were reserved. A look at the ancient rule indicates how closely identified in interest were joint tortfeasors. *Edmonds* grants the shipowner a partial release without anyone's consent or Congress' intention.

Except where an employer is also a shipowner, the Longshoremen's Compensation Act confers on the employer an immunity from suit by the employee. This was confirmed in the 1972 amendments.

Therefore, the previous law remains: a third party whose negligence is one of two or more concurrent causes of injury is liable for the total injury since by definition the accident would not have occurred without the joint negligence of the parties.

Congress had before it several suggestions as to how to ameliorate the burdens on the employer to undo the inequities of the *Ryan* rule which often required the em-

ployer to pay a full indemnity plus a shipowner's legal fees and expenses.

The Senate Hearings on this bill provide further illumination on the issue (pages 351-392 at 373). Papers submitted by the plaintiffs trial lawyers (David Kaplan, Chairman of the Admiralty Section, American Trial Lawyers Association) suggested that the 1927 Act be changed *either* to do away with the right to claim over *or* to a proration of liability between a shipowner and the employer. Obviously the former was accepted and the latter rejected, so that the rule of joint liability remains subject only to the immunity granted by statute.

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974).

In other words, the rule later enunciated in favor of contribution among defending wrongdoers in collision cases under a comparative negligence rule in *U.S.* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975) was a rule considered by Congress in 1972 and rejected in the relationship between the shipowner and employer. But *Reliable Transfer* allowed plaintiff a full recovery while *Edmonds* would deny a full recovery.

Edmonds in the decisions of the Court of Appeals for the Fourth Circuit below thus places burdens on the plaintiff never intended by the legislature when it made third parties liable for "negligence" as known to land law with all the concomitant accoutrements including the liability of a negligent party to pay full damages if it is one of several joint tortfeasors.

The Language of Section 905(b)

Two sentences in this section on third party liability express the key to resolving this case.

"In the event of injury to a person covered under this

Act caused by the negligence of a vessel, then such person, . . . may bring an action against such vessel as a third party . . ."

"If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

The second sentence (and a similar sentence referring to ship building or repair services) embodies the intent, as expressed in the Legislative History, that:

"The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed* v. *S.S. Yaka,* 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. *The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.*" (Emphasis supplied).

The first sentence of the statute makes the shipowner liable for negligence as understood at common law: it is negligence which includes liability for full damages even though a joint tortfeasor. In the second sentence there is no liability if the negligence is attributable only to stevedoring activities which is a restricted negligence liability because here the compensation act provides immunity to the shipowner-employer. But any negligence of a shipowner-employer occurring from its activities as shipowner and not as stevedore subjects it to the same liability as is imposed by the first sentence on all other shipowners. This is properly pointed out in the dissent in *Edmonds.*

Whether or not the employer is a shipowner, all shipowners are fully liable for any negligence, whatever that percentage of fault.

Although wrongly decided, since its final analysis depends on the *Edmonds* case decision below, the two different roles of the shipowner is illustrated by *In re Allied Towing Corp.,* 580 F.2d 702, decided by the Court of Appeals for the Fourth Circuit on July 18, 1978. In that case, a barge owned by Allied exploded while being repaired by Allied at its dock. Limitation of liability was denied because it was carrying a type of fuel not certified by the Coast Guard; the fuel tanks had not been gas freed and Allied had no system for assuring a gas freed vessel. Allied was held liable for its transgressions as owner, but exonerated to the extent that the injuries were caused in its repair operation. Based on *Edmonds,* the Court remanded the case to apportion these two types of fault and allow recovery only for the percentage attributable to ship negligence.

Inconsistently, the court recognized explicitly in *Allied,* what it failed to recognize in *Edmonds,* i.e., that the second sentence of Sec. 905(b) refers *only* to the situation where the shipowner is also the stevedore. It follows that the second sentence has no relevance here.

Under the proper analysis of the *Allied* case, due to its negligence as shipowner, the employer in that case would be liable for full damages less plaintiff's own percentage of damages and less a lien for compensation payments. Otherwise, as shipowner it would be in a different position from a non-employer shipowner, and such a difference was expressly rejected by Congress. The Committee Reports clearly make the liability the same for ship-type negligence for all shipowners when a longshoreman suffers injury. This same Legislative History indicates that *Reed* v. *Yaka* and *Jackson* v. *Lykes Bros. Steamship Co.,* live on, except for a withdrawal of the employee's sea-worthiness remedy and so long as it is ship negligence and not stevedore negligence which causes injury.

That the employer which is also a shipowner is a two-headed beast is also indicated by the well reasoned opinion in *Griffith* v. *Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975), cert. den. There it is clearly pointed out that such an employer has two different liabilities, one as an owner and operator of a vessel, and one as a stevedore company which in the latter case has liability only for compensation. As the owner is a joint tortfeasor, he is liable for all the damages unless the other tortfeasor is not immune from suit, for in that event the damages are paid proportionate to fault.

Limitation of the shipowner's duty to pay full damages places a financial burden on the employee not provided by the Act.

A review of the Legislative History betokens a great deal of solicitude for an injured employee. Inequities for a shipowner and employer were also dealt with.

Nowhere, however, is there the least suggestion that a shipowner should pay only its percentage of fault or is there any suggestion that an employer pay anything more

than compensation and fail to recover its lien out of the third party suit recovery if successful. Any of these results would be a radical departure from previous law and there is no authority in the Legislative History to suggest that an employee-plaintiff receive anything less than a full recovery, less his own negligence and less a repayment of his lien (with a possible payment by the lienor for attorneys' fees).

The Legislative History does not explicitly discuss the rules to be adopted where the negligence of both vessel and stevedore contribute to the injury and deals only with what happens if the employee is contributorily negligent.

It would therefore be obvious, given the airing of the problem from all points of view that the prior law is in no way affected on this point except as explicitly set forth in the statute, i.e., no impleader over against an employer.

Under this analysis the ship may be fully liable for negligence as it always was, and the stevedore employer liable only for compensation which is the obvious intent of the amendment.

There would be no justice in interpreting § 905 to hold that the ship escapes all liability if the stevedore is also negligent and thus to relegate the injured employee only to compensation and not the damages always available against a third party in our legal system. A shipowner would escape on the least showing of stevedore negligence which would result in a clear disincentive to have a safe ship.

The same logic dictates that the Act does not reduce an innocent longshoreman's recovery against a negligent shipowner just because of concurring negligence of the stevedore employer over whom the employee has no control. To reduce the longshoreman's recovery is to resur-

rect the defense of assumption of risk contrary to the stated intent of Congress.

In the House and Senate report the example of shipowner negligence is given of a longshoreman slipping on oil. The shipowner is liable if it knew it was there, or if the oil was there long enough so it should have been discovered, i.e., constructive notice. Or, of course, if the shipowner put the foreign substance on the deck. By saying thereafter that the vessel is not chargeable with the negligence of the stevedore, the reports indicate that the shipowner is liable only where its own negligence is proven, nothing being said that as a joint tortfeasor the owner should pay anything less than full damages less contributory negligence.

If the law is to be analogized to "land-based" law, and using "accepted principles of tort law", then to adopt the rule of the Court below would be a clear innovation completely foreign to the law which prevailed before, or which prevails generally throughout the country. Reasoning in the *Edmonds* case which does not follow any common law rule, was rightly rejected either explicitly or implicitly in all the other circuit courts considering the issue. *Samuels* v. *Empresa Lineas Maritimas Argentinas* (5th Cir. 1978) 573 F.2d 884.

The rationale is perhaps best set forth in the Ninth Circuit Court's decision in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669 (1975), cert. den., 425 U.S. 944 (1976) and *Shellman* v. *U.S. Lines,* 528 F.2d 675 (1975), cert. den., 425 U.S. 936. A similar conclusion was reached in dicta by the Second Circuit in *Landon* v. *Lief Hoegh & Co.* (1975), 521 F.2d 756, cert. den., 423 U.S. 1053 (1976), and specifically by a footnote which was originally footnote 10 of the opinion which was withdrawn by consent of the parties before the opinion was published.

The Third Circuit has discussed the issue and seems inclined to support the majority of the other Circuits. *Marant* v. *Farrell Lines, Inc.* (1977) 550 F.2d 142.

As stated in the *Samuels* opinion:

> "If there is a further adjustment to be made when the vessel's common law negligence is concurrent with the plaintiff's employer's negligence, the decision is for the Congress. . . . To permit the employer's negligence to reduce the joint tortfeasor vessel's liability would reduce the award of the plaintiff, the one person who is blameless. [editorial note: if he is to blame his recovery is thereby reduced]. The innocent victim of concurrent negligence would find that, through some (to him inscrutable) judicial attempt to achieve equity for other parties, he must accept a partial loaf of compensation for the full loaf of joint and several liability."

See also: *Pastorello* v. *Koninklijke Nederl. Stoomb. Maats B.V.* (E.D.N.Y. 1978), 456 F.Supp. 882.

In the 1972 Act, Congress reached a result quite different from the original bill submitted by the Department of Labor, then S.525. Originally, the bill intended to equate a shipowner with an employer and deprive longshoremen of all third party rights, limiting them solely to compensation. Similar bills were under consideration in the 1950's and 1960's.

Since this was never enacted, it is clear that in furtherance of the need to keep ship conditions reasonably safe, the shipowner was to keep his full liability for acts of his own negligence and was in no way to share the employer-stevedore's immunity from suit or to acquire any new partial immunity.

The essence of the joint responsibility of the shipowner and employer with the liability for damages fixed on the

shipowner is explained and made effective in many Circuit Court decisions. Such well-reasoned opinions are exemplified by:

Lubrano v. *Royal Netherlands Steamship Co.*, 572 F.2d 364 (2nd Cir. 1978) (absence of dunnage where evidence showed ship's officer approved and joined in direction for longshoremen to continue work; jury question; joint liability referred to in footnote 4).

Canizzo v. *Farrell Lines, Inc.*, 579 F.2d 682 (2nd Cir. 1978) (grease partially covered by pile of wires placed on deck by crew).

Napoli v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir. 1976) (liability may be predicated on an obvious danger which the shipowner should reasonably anticipate that the longshoreman would be unable to avoid).

Where the stevedore is not protected by the Act, it may be required to contribute to the plaintiff's damages or even bear the entire loss by indemnification. In *Pastore* v. *Taiyo Gyogyo K.K.*, 571 F.2d 777 (3rd Cir. 1978) a city fireman was injured by the concurrent negligence of the shipowner which failed to warn of a dangerous condition (deceptively covered cargo providing hazardous support for a ladder from which the fireman fell) and the stevedore which started the fire. The jury held that the stevedore breached a warranty and it was required to indemnify the shipowner. The case is also interesting because the employer was the City of Philadelphia which had immunity from suit; it could not be called on for contribution as a matter of federal law.

Thus, joint tortfeasors are always jointly liable. But if any one has immunity (or, conceivably if one is judgment-proof), all others are jointly and severally liable for the total.

The relationship of the joint tortfeasors must be sorted out between them depending on their relationship and applicable law as to immunity, contribution or indemnity. It should be of no concern to the injured plaintiff who for a variety of reasons may not be able to sue one of the tortfeasors or to collect a judgment against one or more for financial reasons, lack of insurance coverage or lack of financial ability to pay. *Reliable Transfer* should not be misused to reduce a plaintiff's damages.

This is the universal rule except as applied in the Court below which misapplied the provisions of the Act and read into the Legislative History what is not there on examining it as a whole. In espousing a so-called "equitable" rule, the Court below rewards a negligent shipowner and penalizes an injured longshoreman. The comparative negligence rule, meant to protect the plaintiff in a hazardous maritime employment was used below to take away the protections which the Act meant to preserve for all longshoremen and harbor workers.

Conclusion

This Court should promulgate a uniform rule consistent with recognized law prevailing throughout the country that a joint tortfeasor is jointly and severally liable. Under the Act an injured employee recovers his full damages against a negligent third party less any contributory negligence. His employer recovers its lien and has no further liability unless it is negligent as a shipowner (which is not this case). Any other rule emasculates the third party ac-

tion for the one person for whom the maritime law and the Act were meant to secure a just recovery.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE, PACIFIC MERCHANT SHIPPING ASSOCIATION

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SUBJECT INDEX

	Page
Interest of Pacific Merchant Shipping Association	1
Summary of argument	2
Argument	
I. The opportunity should be taken to decide this case upon a basis which will further the aims of the 1972 Amendments, not only by restoring the emphasis upon compensation, but also by eliminating previous problems and harmonizing doctrines involved	10
A. The 1972 Amendments to the Longshoremen's Act are intended to provide a liberal system of compensation benefits and end reliance of the worker upon third party suits to obtain adequate relief	10
B. Prior to the Amendments the Act had become not only economically inadequate but overburdened with conflict and confusion	14
C. The Amendments explicitly make some of the needed reforms and provide a foundation for the courts to make a new start upon construction to avoid other problems of the past	21
D. The opportunity is presented in this case to construe the Act upon a sound and forward-looking basis with a view to future clarity and harmony and promotion of the policy of the Act	25
II. The 1972 Amendments limit recovery to the percentage of damages equal to the percentage of fault, and none of the arguments to the contrary is substantial	26
A. The rule applied in limiting the plaintiff's recovery below follows clearly from the statute itself, the policy of the statute and equitable principles	26
1. The ruling below is required by the terms and intent of the statute	26
2. The ruling furthers the policy of the Act to promote safety	31
3. The ruling harmonizes the law with respect to workers similarly situated under this and other federal compensation statutes	35
4. The rule is equitable in all respects	36
B. The arguments urged against the ruling below are without merit	40

SUBJECT INDEX

Page

1. The question is not at all whether the longshoreman is to be well compensated but rather how the burden of his liberal compensation is to be borne 40
2. The question is not one of "joint and several liability", a formula not involved here 42
3. The question involved is not of contribution but whether the negligent employer is to be fully indemnified 48

III. The rule applied below should not multiply or complicate proceedings and the presence of the employer as an additional party should normally be unnecessary .. 51

A. There is but a single claim or cause of action against the vessel, having the same elements whether brought by the longshoreman or by his employer 51

B. Only in most exceptional circumstances would there be any occasion for both the longshoreman and his employer to be parties in a third-party action 54

IV. Adoption of the rule urged here will further the purposes of the Act, reduce future litigation, and minimize the occurrence of problems in related areas 56

Conclusion 59

TABLE OF AUTHORITIES CITED

Cases

Page

The ALABAMA and The GAMECOCK, 92 U.S. 695 (1876) . . 44, 47

American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978) 45

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978) 23, 24

Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976) 23, 24

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Bess v. Agromar Line, 518 F.2d 738, 1975 A.M.C. 1621 (4th Cir. 1975) 23

Brown v. American Mail Line, Ltd., 437 F. Supp. 628, 1977 A.M.C. 2526 (D. Or. 1977) 54

Brown v. Mitsubishi Shintaku Ginko, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977) 23, 24

Calbeck v. Travelers Insurance Co., 370 U.S. 114, 1962 A.M.C. 1413 (1962) 15

Cella v. Partenreederei MS Ravenna, 529 F.2d 15, 1976 A.M.C. 600 (1st Cir. 1975) 54

The CHATAHOOCHEE, 173 U.S. 540 (1899) 44

Chouest v. A&P Boat Rentals, 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973) 20

Colonna's Shipyard, Inc. v. Lowe, 22 F.2d 843, 1928 A.M.C. 94 (E.D. Va. 1927) 15

Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224, 1975 A.M.C. 2630 (D. Or. 1975) 34, 37, 39

Czaplicki v. HOEGH SILVERCLOUD, 351 U.S. 525, 1956 A.M.C. 1465 (1956) 4, 17, 51, 52

Davis v. Department of Labor & Industries, 317 U.S. 249, 1942 A.M.C. 1653 (1942) 15

Davison v. Pacific Inland Navigation Co., 569 F.2d 507 (9th Cir. 1978) 23, 24

Dawson v. Contractors Transport Corp., 467 F.2d 727 (D.C. Cir. 1972) 6, 18, 35, 36

Dodge v. Mitsui Shintaku Ginko K.K., 528 F.2d 669, 1975 A.M.C. 2462 (9th Cir. 1975) 31, 34, 36

Edmonds v. Compagnie Generale Transatlantique, 1976 A.M.C. 1027 (E.D. Va. 1976) 37

TABLE OF AUTHORITIES CITED
CASES

Page

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Federal Power Comm'n v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949) 29

Fontana v. Pennsylvania R.R., 106 F. Supp. 461, 1952 A.M.C. 1535 (S.D. N.Y. 1952), aff'd, 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953) 19

Frasca v. Prudential-Grace Lines, 394 F. Supp. 1092, 1975 A.M.C. 1130 (D. Md. 1975) 34

Gay v. Ocean Transport & Trading, Ltd., 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977) 23, 24

Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303, 1970 A.M.C. 2056 (9th Cir. 1970) 16

Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922) .. 15

Gruner v. New York Trust Co. v. United States, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628 (1946) 38

The GULFSTREAM, 64 F. 8 (2d Cir. 1894) 38

Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 1963 A.M.C. 1649 (1963) 15

Halcyon Lines v. Haenn Ceiling & Refitting Corp., 342 U.S. 282, 1952 A.M.C. 1 (1952) 16, 22, 31, 48, 50, 53

Harris v. Westfal-Larsen, 1964 A.M.C. 21 (N.D. Cal. 1963) .. 19

Hawn v. Pope & Talbot, Inc., 198 F.2d 800, 1952 A.M.C. 1708 (3d Cir. 1952) 50

Haynes v. Rederi A/S Aladdin, 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966) 20

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The HUDSON, 15 F. 162 (S.D.N.Y. 1883) 38, 39

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Hurst v. Triad Shipping Corp., 554 F.2d 1237, 1977 A.M.C. 1625 (2d Cir. 1977) 23

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TABLE OF AUTHORITIES CITED
CASES

Page

Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 1964 A.M.C. 1075 (1964) 31, 34

Jarka Corp. of New England v. United States Lines Co., 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967) 20

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Marant v. Farrell Lines, Inc., 550 F.2d 142, 1977 A.M.C. 267 (3d Cir. 1977) 32, 34

The MARISKA, 107 F. 989 (7th Cir. 1901) 38

Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962) 35

Meyer v. United States, 175 F.2d 45 (2d Cir. 1949) 28

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 1970 A.M.C. 967 (1970) 53

Munoz v. Flota Merchante Grancolombiana, S.A., 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977) 23, 33

Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968) 6, 18, 35, 36

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Pope & Talbot v. Hawn, 346 U.S. 406, 1954 A.M.C. 1 (1953) .. 50

Riddick v. Rederi A/B Fredrika, 271 F. Supp. 360, 1967 A.M.C. 1808 (E.D. Va. 1967) 20

Riddle v. Exxon Transportation Co., 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977) 23, 24

Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977) 23

Table of Authorities Cited

Cases

	Page
Russo v. Flota Mercante Grancolombiana, S.A., 303 F. Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969)	20
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Seas Shipping Co. v. Sieracki, 328 U.S. 85, 1946 A.M.C. 698 (1946)	3, 11
Shellman v. United States Lines, Inc., 528 F.2d 675, 1975 A.M.C. 2471 (9th Cir. 1975)	31, 34, 36
Sprague v. Ticonic Bank, 307 U.S. 161 (1939)	54
The SUCAR-SECO, 294 U.S. 394 (1935)	44
Summers v. Tice, 33 Cal. 2d 80 (1948)	45
Swift v. Bolten, 517 F.2d 368, 1975 A.M.C. 1515 (4th Cir. 1975)	54
United States v. Anglin & Stevenson, 145 F.2d 622 (10th Cir. 1944)	54
United States v. Equitable Trust Co., 283 U.S. 738 (1931)	54
United States v. Nielson, 349 U.S. 129, 1955 A.M.C. 935 (1955)	49
United States v. Reliable Transfer Co., 421 U.S. 397, 1975 A.M.C. 541 (1975)	37, 38, 47, 56
United States v. Seckinger, 397 U.S. 203 (1970)	34, 49
United States Fidelity & Guaranty Co. v. United States, 152 F.2d 46, 1945 A.M.C. 1513 (2d Cir. 1945)	53
Valentino v. Rickners Rhederei, G.M.B.H., 552 F.2d 466, 1977 A.M.C. 1618 (2d Cir. 1977)	54
Vaughan v. Atkinson, 369 U.S. 527, 1962 A.M.C. 1131 (1962)	38
Victory Carriers, Inc. v. Law, 404 U.S. 202, 1972 A.M.C. 1 (1971)	16
The VIRGINIA EHRMAN, 97 U.S. 309 (1878)	47
The WASHINGTON and The GREGORY, 76 U.S. (9 Wall.) 513 (1870)	44, 47
Watts v. Camors, 115 U.S. 353 (1885)	38
Wescott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977)	23, 24
Zapico v. Bucyrus-Erie Co., 379 F.2d 714, 1978 A.M.C. 1629 (2d Cir. 1978)	34

Statutes

	Page
Defense Base Act of August 16, 1941, 42 U.S.C. §§ 1651-54	11
District of Columbia Workmen's Compensation Act, 45 Stat. 600 (1928)	11
Extension of Admiralty Act, 46 U.S.C. § 740	15
Federal Employees' Compensation Act:	
5 U.S.C. Sections 8101 et seq.	4, 6, 11, 18, 35
Section 8131	52
Longshoremen's and Harbor Workers' Compensation Act (as amended):	
33 U.S.C. Sections 901 et seq.	passim
Section 902(4)	22
Section 902(21)	27
Section 903(a)	14
Section 905(b)	5, 22, 26, 28, 30, 32, 52, 58
Section 906	12, 21, 57
Section 906(b)	45
Section 908	21
Sections 908-10	57
Section 914(m)	45
Section 928	21
Section 933	11, 51
Section 933(a)	12
Section 933(b)	12
Section 933(e)	18, 40, 55
Section 933(e)(1)(A)	20
Section 933(f)	18, 30
Section 933(g)	19, 21
Nonappropriated Funds Instrumentalities Act of June 19, 1952, 5 U.S.C. §§ 8171-73	11
Outer Continental Shelf Lands Act of August 7, 1953, 43 U.S.C. §§ 1331-43	11
War Hazards Compensation Act of December 2, 1942, 42 U.S.C. §§ 1701-06, 1711-17	11

Rules

	Page
Federal Rules of Civil Procedure:	
Rule 17(a)	55
Rule 23	55
Rule 24(a)	56

Miscellaneous

2 Benedict on Admiralty § 249 (6th ed. 1940) 55

Black's Law Dictionary (4th ed. 1968) 48

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Restatement of Torts § 343 (1934) 24

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,
Petitioner,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE, PACIFIC MERCHANT SHIPPING ASSOCIATION

INTEREST OF PACIFIC MERCHANT SHIPPING ASSOCIATION

Amicus curiae, Pacific Merchant Shipping Association, is a voluntary association of American steamship companies.[1] They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts and may be considered representative of numerous other American steamship companies also involved in such litigation.

This case raises an important question concerning the meaning of the 1972 Amendments to the Longshoremen's

[1]Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines, Matson Navigation Company, United States Lines, Inc., and Farrell Lines.

and Harbor Workers' Compensation Act as to the relative responsibilities of stevedore and shipowner for the ultimate burden of compensation. Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoreman and vessel or between vessel and stevedore, and, consistent with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy overlay of attorneys' fees, by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss among those responsible for it.

SUMMARY OF ARGUMENT

I.A. The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act re-focus the Act upon liberal compensation benefits rather than third-party suits.

The Act covers a great many workers, most of whom are not longshoremen or harbor workers. Prior to 1972 the value of the benefits under the Act had failed to keep up with the cost of living, and longshoremen and harbor workers alone obtained relief by shifting the emphasis of their recoveries from compensation benefits to third-party suits, facilitated by the warranty of seaworthiness under the *Sieracki* case.[2] Although in the very beginning the third-party suit provisions of the Act had been directed primarily to the interests of employers in recouping their payments of compensation, the decline in the value of those benefits shifted control of that action to the injured worker as a major source of compensation. The 1972 Amendments to the Act made a number of reforms, principally an increase of benefits to realistic levels and a return to compensation benefits as the normal mode of compensating the injured employee, with a consequent elimination of a vast overburden of legal expense upon the whole system.

B. In the years before 1972 the Act was afflicted with chronic problems of interpretation related to its jurisdictional scope shoreward, the unavailability of contribution from the negligent employer to a shipowner held without fault for unseaworthiness, and the grant and expansion of a remedy of complete indemnity under the *Ryan* case,[3] which spawned a conflict of interest because of the employers' potential indemnity liability, so that employees

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[2] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698 (1946).

[3] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956).

were allowed to file third-party suits on claims which had been statutorily assigned to their employers under the terms of the Act.[4] It was then even held that the employer might in some circumstances also have an action of its own to recover compensation benefits upon somewhat different grounds.[5] These developments of the law with respect to harbor workers represented an ever-increasing disparity between their treatment and that of the land-based majority of private employees covered by the Act, as well as those government employees covered by the other federal compensation act.[6] There was also increasing confusion about the distribution of recoveries in third-party suits and responsibility for protecting rights in them and paying attorneys' fees to recover them. But the most significant problem was that third-party actions and related litigation overrode the basic compensation aims of the Act and tended to diminish the long-term security of the worker.

C. The explicit reforms of the 1972 Amendments include not only dramatically higher compensation and the right to recover attorneys' fees for obtaining it, but reforms in the geographical jurisdiction of the Act, abolition of the warranty of seaworthiness with respect to vessels and of the vessel owner's corresponding right to recover indemnity from employers and the substitution of a new and exclusive negligence remedy against vessels, based upon traditional common law standards ashore. While the

[4] *Czaplicki v. HOEGH SILVERCLOUD*, 351 U.S. 525, 1956 A.M.C. 1465 (1956).

[5] *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[6] *Federal Employees' Compensation Act*, 5 U.S.C. §§ 8101 *et seq.*

standards for recovery for vessel negligence are still being worked out in the lower courts, great progress has been made toward the development of a rational standard harmonizing the duties of the shipowner toward the longshoreman and toward his stevedore employer, and it remains here to harmonize other features of the reformed third-party cause of action.

D. The disposition of this case may well involve not only the vital legal question directly presented but also the express or implied answers to a number of other questions. These include the nature and relationship of claims against third parties, the existence of a lien and responsibility for protecting it, the possibility of successive suits arising from the same matter and the responsibility for litigation expense and allocation of proceeds and the uniformity of treatment of employees and of employers. Most important among them is whether effect is to be given to the policy of the Act that negligent employers have an economic incentive to safety and that routine substitution of third-party suits for compensation and consequent diversion of funds to pay attorneys' fees and litigation expenses be discouraged.

II.A.1. The limitation of plaintiff's recovery from the vessel to the percentage of damages equal to the vessel's percentage of fault follows clearly from the statute itself, the policy of the statute and equitable principles. Section 5(b) of the Act, added by the 1972 Amendments, does not explicitly deal with the question of joint negligence of vessel and employer, but the first three sentences, when construed to yield parallel results in the situations with which they deal, mean that the vessel is to be held

only for its own negligence, and not for damages allocable to the employer's portion of the total negligence, thus charging the vessel with only its fair share of damages and denying indemnity to the stevedore employer for only that portion of the compensation loss allocable to the employer's own fault.

2. The result will promote safety for, as this Court has recognized, the stevedore employer ordinarily has the superior opportunity and principal burden to protect the longshoreman from danger, and Congress intended that the stevedore employer continue to have a strong incentive to provide on-the-job safety. Before 1972, the imposition of the burden of safety on the employer was accomplished by way of an indemnity action, but that course is now impossible. The lower courts have frequently expressed concern that the stevedore's incentive for safety not be destroyed. The remedies of contribution and indemnity have been foreclosed, and the result below takes account of the fairly obvious truth that the stevedore's negligence will generally exceed that of the vessel, because the stevedore exercises actual control of the work and its employees are present in numbers.

3. The rule of the court below is supported by a line of authority in the District of Columbia, under which both the private employees who form the majority of the employees covered by the longshoremen's Act and the public employees covered by the companion Federal Employees' Compensation Act recover reduced damages where the injury was contributed to by the negligence of the employer.[7]

[7] *Murray v. United States*, 405 F.2d 1361 (D.C.Cir. 1968); *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C.Cir. 1972).

4. The equitable doctrine advocated here produces consistent equitable results, with the employer receiving back only the fair proportion of his expenses attributable to the third-party negligence and having that portion of his burden occasioned by his own negligence not lifted from him by indemnification.

B.1. None of the arguments urged against the ruling below has merit. The result is not harsh upon the longshoreman, although it is perhaps less generous to lawyers than the rule sought by the plaintiff would be. The real question today is not whether the worker will be appropriately compensated, but where the primary burden of that compensation shall be borne and through what channels the burden shall be passed, as it ultimately must be, to the shipowner and with what added burden of inefficiency, uncertainty and legal expense and with what incidental loss of valuable security to the injured workers who settle their suits.

2. The invocation of the formula of "joint and several liability" does not provide a suitable guideline. The formula has no application and as an analogy will not bear analysis. The formula deals only with the situation in which a plaintiff has a choice of collecting his damages from either party, and is based upon a policy of security for the plaintiff which is inapplicable here, where the security is provided by the Act and compensation is guaranteed. There is indeed no joint liability possible in this case, and without joint liability the expression "joint and several liability" means nothing. It is simply an attempt to beg the question involved in the case, which is the extent of

the separate liability of the shipowner under the terms of the Act.

3. Neither is the case to be disposed of by reference to "contribution", a remedy not sought nor in any way involved in the case. The shipowner seeks no recovery from the stevedore employer (whose underwriter as *amicus* here admits indeed that it is not a joint tortfeasor). What is involved in the background of the case, of course, is whether the employer and its underwriter should recover full indemnity at the expense of the shipowner. The denial of such full indemnity, if that be the ultimate result of the ruling below, cannot properly be called contribution between joint tortfeasors without a considerable distortion of language.

III.A. There is no reason at all why the rule adopted below should multiply proceedings, for there is but a single claim having identical elements, and whether the claim is brought by the longshoreman or his employer, the presence of the employer as an additional party should not normally be necessary. The confusion which existed before the 1972 Amendments is clarified by the return to a single claim against the vessel limited to the proportion of damages caused by its negligence. The Act from the beginning contemplated but one third-party claim arising from an injury, which was to be clearly in the hands of either the employer or the employee and normally the former. Then problems gave rise to the judicial recognition of separate claims, but since the 1972 Amendments there is a single joint claim in which both the employer and the employee have an interest. The joint interest can be fully protected in a single suit, whichever party sues being held as trustee

for the other party, and this disposes of the old problem of attorneys' fees by charging them against the total recovery before distribution.

B. There is also no reason at all why the rule adopted below should complicate proceedings by introducing the stevedore as a third party in actions against the vessel, a result which has been suggested by others, as there is but one joint claim against the vessel in which the longshoreman and stevedore have the identical interest to minimize the finding of stevedore negligence, so as to produce the maximum recovery of damages, and each has the motive to co-operate with the other. Whichever brings the action, there will ordinarily be no motive for the other to intervene as a party; such intervention would be warranted only by a conviction of inadequate representation by counsel, in which case, upon a proper showing, the protection of permissive intervention under the federal rules would be available, as in any similar case in which non-parties have an economic interest.

IV. The affirmance of the rule laid down in the court below and its amplification in accordance with the equitable doctrine we advocate will operate strongly to further the purposes of the Longshoremen's and Harbor Workers' Compensation Act, and particularly of the 1972 Amendments to the Act, by placing the emphasis back where it belongs upon compensation benefits, protecting workers in their lifelong entitlement to such benefits, and reducing reliance upon third-party suits which are burdensome to the courts and to all concerned because of the additional economic load which they produce, and will lead to the easy

resolution of a number of incidental legal problems which have produced difficulty in the past.

ARGUMENT

I. THE OPPORTUNITY SHOULD BE TAKEN TO DECIDE THIS CASE UPON A BASIS WHICH WILL FURTHER THE AIMS OF THE 1972 AMENDMENTS, NOT ONLY BY RESTORING THE EMPHASIS UPON COMPENSATION, BUT ALSO BY ELIMINATING PREVIOUS PROBLEMS AND HARMONIZING DOCTRINES INVOLVED

A. The 1972 Amendments to the Longshoremen's Act Are Intended to Provide a Liberal System of Compensation Benefits And End Reliance of the Worker Upon Third Party Suits to Obtain Adequate Relief

The Longshoremen's and Harbor Workers' Compensation Act[8] was passed in 1927 to provide workmen's compensation benefits for longshoremen and other shore-based maritime workers, such as ship repairmen. It has since been extended to other groups of employees for whom the federal government, rather than the states, is responsible, and, as of 1972, it was reported that of the 800,000 employees covered by the Act only about 225,000 were longshoremen or harbor workers while the largest single group of 400,000 were the employees of private employers in the District of Columbia.[9] The vast number of civilian govern-

[8] 33 U.S.C. §§ 901 *et seq.*

[9] J. Cohen and D. Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity In Tripartite Industrial Accident Litigation*, 19 N.Y.L. Forum 587, 596 (1974); *cf. Comment*, 27 U. of Miami L. Rev. 94 (1972). D.C. private employees are brought

ment employees in the District of Columbia and elsewhere are covered by other and earlier federal legislation, the Federal Employees' Compensation Act,[10] with which the Longshoremen's and Harbor Workers' Act should presumably be construed *in pari materia.*

From the time it was passed, the Longshoremen's and Harbor Workers' Compensation Act has contained a provision[11] for suits against third-party tortfeasors to recoup past compensation benefits and obviate the employer's payment of future ones. As the years went by, the Act suffered from the same weakness as the state compensation acts generally did; its benefits were not raised to realistic levels to keep up with the cost of living and wages. The ever-mounting pressure resulting from inadequate benefits was relieved through third-party actions, principally by the granting of the seaman's warranty of seaworthiness to longshoremen in *Seas Shipping Co. v. Sieracki*[12] in 1946 and by the fantastic expansion of the scope of the doctrine in longshoremen's cases in subsequent years.

At the outset, the Act reflected the primary interest of the employer in third-party recoveries, as a means of re-

under the Act by the District of Columbia Workmen's Compensation Act, 45 Stat. 600 (1928). Other workers covered by the Act are civilian employees at military bases outside the United States by virtue of the Defense Base Act of August 16, 1941, 42 U.S.C. §§ 1651-54; employees of federal contractors outside the United States by virtue of the War Hazards Compensation Act of December 2, 1942, 42 U.S.C. §§ 1701-06, 1711-17; employees under the Outer Continental Shelf Lands Act of August 7, 1953, 43 U.S.C. §§ 1331-43; and certain employees of nonappropriated funds instrumentalities of the armed forces under the Nonappropriated Funds Instrumentalities Act of June 19, 1952, 5 U.S.C. §§ 8171-73.

[10] 5 U.S.C. §§ 8101 *et seq.*

[11] 33 U.S.C. § 933.

[12] 328 U.S. 85, 1946 A.M.C. 698 (1946).

ducing or recouping its compensation exposure, by placing control of such actions for all intents and purposes in the employer's hands through an assignment effective whenever an employee was paid compensation.[13] With the rise of the third-party suit as the principal means of obtaining substantial compensation in cases of any seriousness and the corresponding decline of interest on the part of the employer in recouping the all too modest compensation benefits, there was naturally pressure for control of the third-party suit by the worker rather than the employer.[14] This culminated in an amendment in 1959 by which the employee was allowed to take the compensation award and retain the opportunity to sue the third party for six months thereafter before the assignment became effective.[15]

The 1972 Amendments to the Act were specifically directed to a number of reforms. At their heart, however, lay a radical increase of benefits, including removal of fixed ceilings from disability benefits and future control by formulas related to wage levels generally,[16] by which the very reason for most other problems would be abated and the emphasis placed back where it belonged.

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[13]Act of Mar. 4, 1927, ch. 509, § 33, 44 Stat. 1440, 33 U.S.C. § 933(b).

[14]*See* Comment, 27 U. of Miami L. Rev. 94, 98 (1972):

> "When one views the dismal record of maximum allowable compensation under the Act, it is no wonder that third party lawsuits became a popular vehicle for making an injured worker 'whole'. . . ."

[15]Act of Aug. 18, 1959, Pub. L. 86-171, 73 Stat. 391, 33 U.S.C. § 933(a) and (b).

[16]33 U.S.C. § 906; *see* Comment, 27 U. of Miami L. Rev. 94, 104-05 (1972).

The Senate Committe said of the Amendments:

> The principal purpose . . . is to amend the . . . Act in order to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate necessary administrative reforms.[17]

The Committee went on to say that the provisions of the amendments "will provide an adequate, prompt, and equitable system of compensation for the over 800,000 employees who depend upon its protection"[18] and that the Amendments would raise "benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act."[19]

Both the Senate and House Committees reported testimony that third-party actions had increased substantially in recent years, that much of the financial resources which should be utilized to pay better compensation benefits were being spent in supporting litigation and that in some cases workers were being encouraged to forego filing claims for compensation or to delay return to work to increase possible recovery in third-party actions.[20] The Senate Committee concluded:

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[17]S. Rep. 92-1125, 92d Cong., 2d Sess. 1 (1972).

[18]*Id.* at 2.

[19]*Id.* at 5.

[20]*Id.* at 9; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4702-03. The same problems can exist under the new law. The longshoreman may never receive his compensation award, may have no knowledge of what he is entitled to receive without substantial trial attorney's fees and costs, and may never have had the opportunity to decide whether it was worthwhile to him even to proceed with a third-party suit. The stevedore may pay temporary compensation money

> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.[21]

Finally, the House committee, referring to the other federal workmen's compensation act, said:

> Congress demonstrated a deep concern for providing adequate workmen's compensation for injured American workers when they amended the Federal Employees' Compensation Act in 1966. The objective of Congress in the matter of workmen's compensation is clear. It is to provide a modern *workmen's compensation program* for a substantial number of American workers and their families.[22] [Emphasis supplied.]

B. Prior to the Amendments the Act Had Become Overburdened With Conflict and Confusion

The jurisdictional scope of the Longshoremen's and Harbor Workers' Act had been a nagging problem throughout the Act's life. As originally drawn, the Act was based on the admiralty power, was intended to reach as far into the waterfront as that power permitted and, unfortunately, was couched in terms of the relative powers of state and federal governments[23] so that every new question of its

and medical care and then make several "advances" of permanent compensation. In effect the stevedore helps plaintiff finance his suit against the vessel, while studiously avoiding a compensation award liquidating the final benefits due from the stevedore to the longshoreman.

[21] S. Rep., *supra* note 17, at 4.

[22] H.R. Rep., *supra* note 20, at 4711.

[23] "Compensation shall be payable . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Act of Mar. 4, 1927, ch. 509, § 3(a), 44 Stat. 1426.

application in a given activity[24] or location[25] was a constitutional question. This led to the desperate expedient of the "twilight zone" doctrine under which the constitutional questions were avoided in close cases by treating the compensation claim as within whichever power, state or federal, was first asserted.[26] When this doctrine created at least as many problems as it solved, it was decided, in the *Calbeck* case,[27] to ignore the constitutional allusion in the Act, focus on other language, and apply the Act to all injuries upon navigable waters and in dry docks.

The admiralty jurisdiction of the courts had been extended ashore in cases of injury caused by vessels on navigable waters.[28] Despite abandonment of the constitutional test for its application, federal compensation did not follow the admiralty jurisdiction ashore but was held at the water line.[29] Inadequate as they frequently were, the benefits under the Act were often more liberal than those under state acts ashore and the third-party suit was again found to be the longshoreman's solution. An unseaworthiness remedy was established for injuries ashore caused by the operations of the vessel[30] and from that breakthrough

[24] *E.g.*, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

[25] *E.g.*, *Colonna's Shipyard, Inc. v. Lowe*, 22 F.2d 843, 1928 A.M.C. 94 (E.D. Va. 1927).

[26] *Davis v. Department of Labor & Industries*, 317 U.S. 249, 1942 A.M.C. 1653 (1942); *see* F. Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. of Mar. L. & Comm. 1, 5-7 (1972).

[27] *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 1962 A.M.C. 1413 (1962).

[28] Extension of Admiralty Act, 46 U.S.C. § 740.

[29] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 1969 A.M.C. 1967 (1969).

[30] *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 1963 A.M.C. 1649 (1963).

new third-party actions strained old doctrines, pressing them farther shoreward.[31]

We have already pointed out that the benefits under the Act were formerly inadequate and how the warranty of seaworthiness was created and expanded in the third-party suits to provide a potential, if frequently capricious, substitute. Equity might have suggested that an employer jointly at fault with the shipowner should contribute to damages recovered from the latter in a third-party action but the ultimate decision in the *Halcyon* case[32] was otherwise and the result, although well grounded in statutory language, was anything but equitable. It was shortly determined in the *Ryan case*,[33] however, that, while the shipowner could not have half a loaf, he could have a whole one, in the name of indemnity rather than contribution, and thus a new and opposite inequity was created under which not only employers but courts have frequently chafed.

Confusion and inconsistency also developed in connection with suits brought by the employer. The indemnity doctrine of the *Ryan* case created a conflict of interest for an employer who had taken a statutory assignment of the third-party claim, as to that portion of the potential excess recovery over compensation liability which might ultimately be paid to the employee, and consequently it was held

[31] *See, e.g., Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303, 1970 A.M.C. 2056 (9th Cir. 1970), *overruled in part by Victory Carriers, Inc. v. Law*, 404 U.S. 202, 1972 A.M.C. 1 (1971).

[32] *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 1952 A.M.C. 1 (1952).

[33] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956).

that, despite the assignment, the employee could maintain a separate third-party action.[34]

When an employer sued on an assigned claim, he had, of course, the cause of action which the employee had—no more nor less—and this could be grounded upon both maritime negligence concepts and the warranty of seaworthiness and was subject to the defense of the employee's contributory negligence. But it was eventually held by this Court that, in some circumstances, an employer had a potential cause of action for its compensation expenses against the vessel owner, based on a theory of independent tort against the employer and quite apart from assignment.[35] The employer's cause of action in such a case was for negligence only,[36] as no warranty of seaworthiness ran to its benefit,[37] and, under prevailing maritime principles, the claim was subject to reduction for the employer's own contributory negligence, including not only the negligence of the injured man but that of any others of its employees.

[34] *Czaplicki v. HOEGH SILVERCLOUD*, 351 U.S. 525, 1956 A.M.C. 1465 (1956).

[35] *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[36] *Id. at 415*, 1969 A.M.C. at 753.

[37] *Hugev v. Dampskisaktieselskabet International*, 170 F.Supp. 601, 1959 A.M.C. 439 (S.D. Cal. 1959), *aff'd adopting opinion below sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet International*, 274 F.2d 875, 1960 A.M.C. 591 (9th Cir. 1960), holding that the duty of the vessel to the employer is to exercise ordinary care to place the vessel, etc., in such condition that an expert and experienced stevedore, mindful of danger reasonably to be expected, will be able, in the exercise of ordinary care, to load or discharge the cargo in a workmanlike manner with reasonable safety and to give the stevedore reasonable warning of the existence of a latent danger not reasonably to be expected where the shipowner should reasonably expect the stevedore to encounter it.

These disparities in the treatment of longshoremen's injury claims themselves were matched by other disparities between the treatment of such claims and of comparable claims arising with respect to federal employees and the land-based majority of private employees covered by the Longshoremen's and Harbor Workers' Compensation Act. By contrast, under the Federal Employees' Compensation Act, where the employer has been jointly negligent with a third party against whom suit is brought, the latter has been held liable for only 50% of the damages, under equitable principles, the other moiety being deemed to have been statutorily compromised in the Compensation Act,[38] and the same rule applies to some 400,000 private employees in the District of Columbia under the Longshoremen's and Harbor Workers' Compensation Act.[39]

There was also confusion as to the existence and handling of so-called "liens" of employers for compensation expense, where employees had brought third-party suits. The Act was originally drawn contemplating that employers, as the parties primarily interested, would ordinarily be the ones to bring third-party suits, and detailed provision was made for the distribution of a third-party recovery by the employer.[40] But no comparable provision exists for distribution of a third-party recovery by an employee, the provision in that case being simply that the employer may take credit for such a recovery against any compensation liability it may have[41] and that an employee

[38]*Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968).

[39]*Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972).

[40]33 U.S.C. § 933(e).

[41]*Id.* § 933(f).

who compromises a third-party claim without the consent of the employer (for whose ultimate benefit it exists) thereby waives further compensation benefits.[42]

As the emphasis shifted to third-party suits by employees, a practice arose of making voluntary payments of temporary disability compensation, pending suit and without a formal award which would result in a statutory assignment, and the question arose how such payments and medical expenses could be recouped out of the employee's third-party recovery. The statute then and now has made no provision for a lien for such amount.[43] The solution was found in a line of cases recognizing an equitable right in the employer to recover compensation benefits previously paid, out of the proceeds of the third-party action, thus treating the employee, in effect, as a trustee for the employer in bringing the action.[44] The lack of definition in this area has led to confusion as to when and against whom the compensation benefits could be recovered and to attempts to recover them directly from the third party rather than out of the damages received by the employee.[45]

A related problem was whether the third-party vessel owner had an obligation to protect the employer's interest

[42]*Id.* § 933(g).

[43]The dissent from the decision below *en banc* incorrectly states that the 1972 Amendments provided for a lien. 577 F.2d at 1157, 1978 A.M.C. at 1678.

[44]*The ETNA*, 138 F.2d 37, 1943 A.M.C. 1126 (3d Cir. 1943); *Fontana v. Pennsylvania R.R.*, 106 F. Supp. 461, 1952 A.M.C. 1535 (S.D. N.Y. 1952), *aff'd*, 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953) and cases there cited.

[45]*See, e.g., Harris v. Westfal-Larsen*, 1964 A.M.C. 21 (N.D. Cal. 1963) (not otherwise reported).

in recouping compensation benefits out of third-party damages by paying them directly to the employer rather than to the plaintiff employee, leaving it to the latter to repay the employer and, on this point, the courts reached conflicting decisions.[46] Another related problem was the treatment of attorneys' fees. The Act allows the employer to deduct litigation expense as the first step in allocation of recovery under an assigned cause of action[47] but makes no such provision where the employee's attorneys' fees are concerned and the courts reached conflicting decisions on whether, when and to what extent the employer might be charged with a portion of the litigation expense from which he benefited.[48]

What had developed prior to the 1972 Amendments was a pattern in which third-party actions and related litigation over damages overrode and eclipsed almost entirely the basic compensation aims of the Act, under which workers were intended not to receive immediate large sums but to have lifetime medical care and disability protection. Prior to the Amendments, the Act made no provision for a compensation applicant to recover attorneys' fees and,

[46] *Compare International Terminal Operating Co. v. Waterman Steamship Co.*, 272 F.2d 15, 1960 A.M.C. 306 (2d Cir. 1959) *with Jarka Corp. of New England v. United States Lines Co.*, 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967); *see* Gorman, *supra* note 26 at 27-28.

[47] 33 U.S.C. § 933(e)(1)(A).

[48] *Compare Chouest v. A&P Boat Rentals*, 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973) *and Scozzari v. Jade Co.*, 350 F. Supp. 801, 1973 A.M.C. 1886 (E.D.N.Y. 1972) *with Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966); *Russo v. Flota Mercante Grancolombiana, S.A.*, 303 F. Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969) *and Riddick v. Rederi A/B Fredrika*, 271 F. Supp. 360, 1967 A.M.C. 1808 (E.D. Va. 1967); *see* Gorman, *supra* note 26, at 24-26.

as awards themselves were low, the fees of workers' counsel, which had to be taken out of the awards, were very low in comparison to the contingent fees which could be obtained from third-party damages. The result was a serious and persistent conflict of interest for plaintiff's attorneys; a worker, whose best interest lay in lifetime protection from the still unknown consequences of his injury, could (and still can) lose that protection upon his lawyer's advice to bring a lawsuit and enter into a no-consent settlement[49] (the almost invariable kind), out of which the attorney would obtain a substantial percentage fee. That situation will continue to the extent that plaintiff's lawyers are motivated by the continued attractiveness of the third-party suit as an alternative to compensation proceedings in which fees are subject to scrutiny and control.[50]

C. The Amendments Explicitly Make Some of the Needed Reforms And Provide a Foundation for the Courts to Make a New Start Upon Construction to Avoid Other Problems of the Past

The 1972 Amendments explicitly make a number of important reforms. The central and most important one, of course, is the dramatic increase of compensation benefits[51] with a right to recover the attorney's fees for obtaining them.[52] The troublesome old geographical formula for the scope of the coverage was abandoned and coverage extended far enough ashore to embrace workers in the same work force as those aboard ship who would reasonably

[49] 33 U.S.C. § 933(g).

[50] *Id.* § 928.

[51] *Id.* §§ 906, 908.

[52] *Id.* § 928.

expect similar treatment.[53] The right of the shipowner to recover indemnity from the employer was abolished[54] and the longshoreman's cause of action against the vessel was completely reformed and restructured by eliminating the warranty of seaworthiness and restricting any such recovery to actual negligence[55] to be determined not, as formerly, in accordance with certain maritime doctrines but according to traditional common law standards ashore.[56] The *Halcyon* case,[57] too, correct though it be in its own situation, was left behind by history, with the material modification of the statute on which it was based.

It is appropriate to pause here and look more closely at the longshoreman's new cause of action against the vessel because of its significance in harmonizing rights of longshoremen and stevedore employers and because of its central importance in making the third-party suit again the exceptional, rather than the common, remedy.

Both the Senate and House Committees stated:

> The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called such as "unseaworthiness", "nondelegable duty", or the like.[58]

[53] *Id.* §§ 902(4). *See Northeast Marine Terminal Co. v. Caputo*, 429 U.S. 998, 1977 A.M.C. 1037 (1977).

[54] 33 U.S.C. § 905(b).

[55] *Ibid.*

[56] S. Rep., *supra* note 17, at 10; H.R. Rep., *supra* note 20, at 4703.

[57] Note 32, *supra*.

[58] S. Rep., *supra* note 17, at 10; H.R. Rep., *supra*, note 20, at 4703.

The Courts of Appeals have reached substantial agreement on the foundations of the standard of care in actions by the longshoreman against the vessel. Courts have turned to the land-based law of premise owners' liability to find traditional, non-maritime common law rules of liability while avoiding the application of peculiar rules from state law.[59] These rules articulate new uniform standards which do not embrace the displaced doctrine of unseaworthiness or forms of vicarious liability flowing from the imposition of non-delegable duties.[60]

Even in relatively specific details, the standards have remained harmonious. The most fundamental agreement, that the vessel is liable for its own active negligence which injures a longshoreman by, for example, dropping something on him, has not even required discussion. On the question of the vessel's liability for dangerous conditions, adherence to fundamental negligence principles has dictated that the vessel not be liable for conditions of which it neither knew nor should have known.[61] Substantial dis-

[59] S. Rep. *supra* note 17, at 10; H.R. Rep., *supra* note 20, at 4703; *Davison v. Pacific Inland Navigation Co.*, 569 F.2d 507, 508 n.1 (9th Cir. 1978); *Hurst v. Triad Shipping Corp.*, 554 F.2d 1237, 1977 A.M.C. 1625 (2d Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 1976 A.M.C. 2048 (4th Cir. 1976).

[60] *Hurst v. Triad Shipping Corp., supra* note 59; *Bess v. Agromar Line*, 518 F.2d 738, 1975 A.M.C. 1621 (4th Cir. 1975).

[61] *Anderson v. Iceland Steamship Co.*, 585 F.2d 1142 (1st Cir. 1978); *Wescott v. Impresas Armadoras, S.A.*, 564 F.2d 875 (9th Cir. 1977); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977); *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 1977 A.M.C. 1289 (2d Cir. 1977); *Hurst v. Triad Shipping Co.; Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 1977 A.M.C. 843 (2d Cir. 1977); *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1977 A.M.C. 996 (5th Cir. 1977); *Bess v. Agromar Line*, 518 F.2d 738, 1975 A.M.C. 1621 (4th Cir. 1975).

pute seems to exist only on the issue of how much the policy of the 1972 Amendments and the expertise of the stevedore contractor limit the vessel's duty to warn of or correct obvious or known dangers,[62] but here a significant trend promises to harmonize the vessel's duty to the longshoreman with its well-established duty to his stevedore employer in a reasonable way so that the same conduct will be a breach as to both or neither.[63]

The courts having now made substantial progress in harmonizing the duties of the shipowner toward the longshoreman and toward his stevedore employer, the way is open to go forward and harmonize other features of the

[62]*See, e.g., Lubrano v. Royal Netherland Steamship Co.*, 572 F.2d 364, 1978 A.M.C. 826 (2d Cir. 1978); *cf. Anderson v. Iceland Steamship Co.; Davison v. Pacific Inland Navigation Co.*, 569 F.2d 507 (9th Cir. 1978); *Wescott v. Impressas Armadoras, S.A.*, 564 F.2d 875 (9th Cir. 1977); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1978 A.M.C. 741 (4th Cir. 1977).

[63]In *Metropolitan Stevedore Co. v. Dampskisaktieselskabet International*, 274 F.2d 875, 1960 A.M.C. 591 (9th Cir. 1960), affirming and adopting *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601, 1959 A.M.C. 439 (C.D. Cal. 1959), the court, well before the 1972 Amendments established the basic duty of vessel to stevedore in terms (unaffected by the Amendments) based on Restatement of Torts § 343 (1934), now slightly modified as Restatement (Second) of Torts §§ 343 & 343A (1965) (see note 37, *supra*). This decision has been directly relied on by the Court of Appeals for the Fourth Circuit in stating the standard of care for longshoremen. *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103, 1110-11 n.13, 1978 A.M.C. 741, 746 n.7 (4th Cir. 1977). Other decisions rely upon the same Restatement standard. *Brown v. Mitsubishi Shintaku Ginko*, 550 F.2d 331, 1977 A.M.C. 989 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 1977 A.M.C. 996 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 1976 A.M.C. 2046 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 1976 A.M.C. 551 (2d Cir. 1976). And *Wescott v. Impressas Armadoras, S.A., supra* note 61, the only decision of the Court of Appeals for the Ninth Circuit since 1972 directly involving the standard of care, while not discussing its earlier decision in *Metropolitan Stevedoring Co.*, is fully consistent with it.

third-party cause of action as reformed under the 1972 Amendments.

D. The Opportunity Is Presented in This Case to Construe the Act Upon a Sound and Forward-Looking Basis With a View to Future Clarity and Harmony and Promotion of the Policy of the Act

The instant appeal raises, in clear and simple terms, a vital legal question. The answer to it involves, either expressly or by implication, answers to a number of other questions: What kind of claim against the vessel is permitted under the Amendments? Is there more than one such claim? If so, to whom do they belong at given times; do they depend on the same or different elements; and what is the relationship of the recoveries? The Court's decision here and the terms in which it is expressed will thus have implications affecting a number of the problems we have pointed out, concerning the nature and relationship of claims against third parties. These include questions concerning: the existence of a "lien" and the responsibility for protecting it; the possibility of successive suits against the shipowner, perhaps years apart; the responsibility for litigation expense; the allocation of proceeds; and the uniformity of treatment of employees and employers under the Act. Most importantly, the answer here will determine whether effect is to be given to the policy of the Act that negligent employers have an economic incentive for safety[64] and that the routine substitution of third-party suits for compensation and consequent diversion of

[64]S., Rep. *supra* note 17, at 2; H.R. Rep., *supra* note 20, at 4699.

funds to pay attorneys' fees and litigation expenses be discouraged.[65]

II. THE 1972 AMENDMENTS LIMIT RECOVERY TO THE PERCENTAGE OF DAMAGES EQUAL TO THE PERCENTAGE OF FAULT, AND NONE OF THE ARGUMENTS TO THE CONTRARY IS SUBSTANTIAL.

A. The Rule Applied in Limiting the Plaintiff's Recovery Below Follows Clearly From the Statute Itself, the Policy of the Statute And Equitable Principles

1. The Ruling Below Is Required by the Terms And Intent of the Statute

Since we are here concerned in detail with section 5(b)[66] of the Act, which was added in its entirety by the 1972 Amendments, we set out the text of it in full:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

[65] See text at note 20, *supra*.

[66] 33 U.S.C. § 905(b).

While the Amendment just quoted does not explicitly deal with questions of joint negligence of vessel and employer, it does contain evidence to indicate that the vessel is to be held only for the damages chargeable to its own negligence. The first sentence of the Amendment grants a general right of recovery against the vessel for negligence. The second and third sentences are qualifications of the grant dealing with the special situation in which the employer, who would otherwise not be subject to suit, is also an owner or other party identified as a "vessel"[67] against whom a right is granted in the first sentence. In such a case the employer is viewed for the purpose of the Act in two different capacities, on the one hand as vessel owner subject to suit and on the other hand as a stevedore liable to provide compensation benefits.[68]

There is a "natural presumption" that when the same words are used in different parts of a statute they are intended to have the same meaning[69] and it is generally

[67] *See* 33 U.S.C. § 902(21).

[68] This is more fully explained in H.R. Rep. *supra* note 20.

[69] *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

held that identical words used in the same section more than once will be so construed.[70]

If "the negligence of a vessel" in the first sentence is read to mean any negligence of the vessel at all and "the negligence of persons" in the second sentence is given a similar reading to refer to any negligence at all, then an absurd inconsistency of results appears, since the employee of an independent contractor, subject only to the first sentence, will then recover 100% of his damages even though his fellow employees rendering stevedoring services have committed 99% of the negligence, while a longshoreman employed by the vessel owner and subject to the qualifications of the second sentence, would recover none of his damages at all if his fellow longshoremen committed even 1% of the negligence.

Thus, section 5(b) of the Act cannot be read literally throughout and must be internally reconciled. The section may be harmonized by recognizing that the words "caused by the negligence" in the first, second and third sentences contemplate not just the fact but the extent of causation. As the court below *en banc* noted, such a reading harmonizes these sentences.[71] The words "if the injury was caused" in the second and third sentences should be read to mean "to the extent the injury was caused" and the first, or granting, sentence should accordingly be construed as qualified in the same way, to conform to the specific exceptions stated in the second and third sentences following it.

[70] *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949), quoting *Lewellyn v. Harbison*, 31 F.2d 740, 742 (3d Cir. 1929).

[71] 577 F.2d at 1155, 1978 A.M.C. at 1674.

The interpretation of all three sentences in this way, authorizing recovery of the portion of damages allocable to the defendant, averts a collision of principle between these sentences and achieves consistent results in the cases with which they deal.[72] It is no answer to point out, as others do at length,[73] how the second and third sentences were intended to deal with direct employees of shipowners, as though that deprived them of significance here. The shipowners start from that point and recognize that, whether the two sentences confer new rights upon certain longshoremen or only emphasize that shipowners are not to be held for stevedore negligence,[74] their effect upon the construction of the statute for this case is the same.

The resulting rule is the only possible rule consistent with the terms of the Act which is completely equitable. It charges the vessel owner with only his fair share of the damages done, denies indemnity to the stevedore employer for that portion, and only that portion, of the compensation loss fairly allocable to the employer's own fault and leaves the longshore worker protected, since, to the very extent that his immediate lump sum damages in his third-party

[72] If possible, all sections of a statute must be reconciled so as to produce a symmetrical and harmonious whole. *See, e.g., Federal Power Comm'n v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949). Moreover, the result would comply with the expressed legislative intent . . . "that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." S. Rep. *supra* note 17, at 12.

[73] Petitioner's Brief at 29-33; *Amicus* Liberty Mutual Insurance Company's Brief at 25-26; *Amicus* National Association of Stevedores' Brief at 10-12.

[74] *Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84, 1978 A.M.C. 1859 (N.D. Cal. 1978).

action (taken as a credit by the employer)[75] are reduced, the potential value of future compensation payments, in which he has a lifelong security, will be enhanced.[76]

The rule is fully consistent with that section of the Act providing that the employer "shall not be liable to the vessel for *such damages* [*i.e.,* the damages paid an injured longshoreman by a negligent vessel owner] directly or indirectly. [77] The drafters of the Act intended this language to eliminate the usual *Ryan* indemnity suit whereby the stevedore was subject to dual liability for compensation benefits and damages. Since the stevedore's maximum exposure is limited to the amounts set forth in the Act and the stevedore is not called upon to reimburse the vessel for any damages paid plaintiff, the rule conforms to both the letter and intent of the Act.

The rule is also consistent with the intent of the drafters that the vessel "shall not be liable in damages for acts or omissions of stevedores".[77a] If the vessel were liable under the Act or to the full extent of common law damages, when it was only 1% negligent while the stevedore was 99% negligent, then the vessel would indeed be liable for negligence of the stevedore.

While there is unquestionably a conflict between the decision below and decisions in other circuits, both the

[75]33 U.S.C. § 933(f).

[76]The rule here has nothing to do with the fellow-servant doctrine, a rule under which formerly an employee's recovery of damage from his employer was defeated if his injury was caused by his co-employees rather than by his employer personally. What is urged here is that, under the statute, the worker's recovery from a third party (not his employer) be not defeated but limited to the fault of the third party.

[77]33 U.S.C. § 905(b) (emphasis added).

[77a]H.R. Rep., *supra* note 20, at 4703.

scope of the conflict and the weight of the other decisions have been exaggerated in some of the briefs. Examination will show conflict only with the Fifth and Ninth Circuits. The Fifth Circuit decision in the *Samuels* case[78] relies on the earlier Ninth Circuit decisions (on consolidated hearing) in the *Dodge* and *Shellman* cases.[79] *Dodge* and *Shellman* unquestionably reject the result reached by the court below, but it seems proper to suggest that they are entitled to limited respect since the court, while fully aware of the inequity of its decision,[80] failed to analyze the 1972 Amendments to determine whether they offered the opportunity to reach a fairer result and so disposed of them by application of *Halcyon.*

2. The Ruling Furthers the Policy of the Act to Promote Safety

The decision of the court below is consistent with the longstanding efforts of the courts and Congress to promote safety on the waterfront by imposing the cost of injuries on the party in the position to avoid harm. Well before the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, this Court in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,*[81] recognized that the stevedore employer, actually directing his activities and supplying or deploying the equipment involved, had ordinarily the best opportunity to promote the

[78]*Samuels v. Empresa Lineas Maritimas Argentinas,* 573 F.2d 884, 1978 A.M.C. 1647 (1978).

[79]*Dodge v. Mitsui Shintaku Ginko K.K.,* 528 F.2d 669, 1975 A.M.C. 2462 (9th Cir. 1975); *Shellman v. United States Lines, Inc.,* 528 F.2d 675, 1975 A.M.C. 2471 (9th Cir. 1975).

[80]528 F.2d at 672, 680, 1975 A.M.C. at 2467, 2478-79.

[81]376 U.S. 315, 1964 A.M.C. 1075 (1964).

safety of the longshoremen and should bear the principal burden of doing so.

In connection with the 1972 Amendments, both the House and Senate committees also recognized this truth and asserted their intention to give it effect:

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family but, by assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.[82]

And the courts have recognized this intention of the 1972 Amendments to focus responsibility upon the stevedore employer. The Court of Appeals for the Third Circuit has said:

> As Judge Van Dusen has recently observed, speaking for this court, "express language in the statute and the legislative reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." . . . This was an important aspect of the legislative plan, intended to focus responsibility for the longshoremen's safety on those best able to improve it, the stevedores. To say that responsibility is concurrent or joint is plainly inconsistent with the intention of the Act to place primary responsibility on the stevedore.[83]

The Court of Appeals for the Second Circuit has said:

> Since the stowage of cargo . . . was peculiarly the responsibility of UMS, we would be remiss in our duty

[82]H.R. Rep., *supra* note 20, at 4699, S. Rep., *supra* note 17, at 2.

[83]*Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 1977 A.M.C. 267, 270 (3d Cir. 1977).

> to other harbor workers if we required the owner to pay for the stevedore's negligence. All incentives for the stevedore to monitor unsafe procedures would then be lost for under the Act the stevedore is immune from indemnity actions.[84]

And, in an early case considering the 1972 Amendments, the District Court for the Eastern District of Pennsylvania said:

> We cannot at this time fashion the outlines of the negligence remedy Congress allowed to be brought against the vessel . . . . It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore. The substantial increase in compensation benefits provided by the amendments was thought to be an incentive to the stevedore to provide a safe place to work . . . . Courts should recognize that this duty falls primarily on the stevedore and not on the vessel owner.[85]

In the former state of the law the recognized policy of imposing the burden of safety upon the party best situated to carry it was ordinarily given effect by the circuitous and expensive process of first imposing liability upon the vessel and then passing it on to the employer through an indemnity suit.

As we have seen, it is the aim of the 1972 Amendments to eliminate the wasteful economic load of that process by ordinarily resting the burden upon the employer in the first instance through compensation payments. Once the

[84]*Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 841, 1977 A.M.C. 843, 847-48 (2d Cir. 1977).

[85]*Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F.Supp. 759, 768-69, 1974 A.M.C. 1085, 1099-1100 (E.D. Pa. 1974).

burden is laid upon the vessel, however, the possibility of passing any portion of it on to the stevedore employer by way of contribution or indemnity has been eliminated.[86]

But it is still a fairly obvious truth that when, as usual, a stevedore is in actual control of the work, with its employees present in numbers, any negligence of the vessel with respect to a condition or procedure involved will, as a practical matter, usually be exceeded by the concurrent negligence of the stevedore.[87] The rule applied below will prevent the wholesale shifting of the burden of the stevedores' negligence to the ship owner and the consequent frustration of the Congressional intent to provide a sharp incentive for safety.

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[86]33 U.S.C. § 905(b); *cf. United States v. Seckinger*, 397 U.S. 203 (1970).

[87]Recent decisions apportioning liability have confirmed the Court's statements in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 323-24, 1964 A.M.C. 1075, 1081-83 (1964) that the stevedore's immediate presence and supervision provide it the greater opportunity to minimize the risks of injury. In the case at bar the stevedore's negligence was 70% and the vessel owner's negligence 20%; in *Shellman v. United States Lines, Inc.* 528 F.2d 675, 1975 A.M.C. 2471 (9th Cir. 1975), the stevedore accounted for 70% of the negligence. In *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 1978 A.M.C. 1629 (2d Cir. 1978), the stevedore and the cargo owner were each found 50% at fault. In the following cases the stevedore was also found 50% at fault: *Marant v. Farrell Lines, Inc.*, 550 F.2d 142, 1977 A.M.C. 267 (3d Cir. 1977); *Dodge v. Mitsui Shintaku Ginko K.K.*, 528 F.2d 669, 1975 A.M.C. 2462 (9th Cir. 1975); *Frasca v. Prudential-Grace Lines*, 394 F. Supp. 1092, 1975 A.M.C. 1130 (D. Md. 1975). In *Hubbard v. Great Pacific Shipping Co.*, 404 F. Supp. 1242, 1975 A.M.C. 1518 (D. Or. 1975), the stevedore's negligence was 20%, but in *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224, 1975 A.M.C. 2630 (D. Or. 1975), the stevedore was 30% negligent, the plaintiff 50% and the shipowner 20%.

3. The Ruling Harmonizes the Law With Respect to Workers Similarly Situated Under This And Other Federal Compensation Statutes

The foundation principles of the rule adopted by the court below *en banc* are applied, even though precisely the same result is not reached, in a line of cases in the District of Columbia. Those start with *Martello v. Hawley*,[88] holding that where one joint tortfeasor has compromised the claim, the other tortfeasor, since he cannot obtain contribution because the settling tortfeasor has bought his peace, is nevertheless protected by having the tort judgment reduced one-half, upon the basis that one-half of the claim has been sold by the claimant when he executes the settlement. This even disposition was evidently dictated by District of Columbia doctrine, which did not discriminate finely between degrees of negligence.

In *Murray v. United States*,[89] the plaintiff was under the Federal Employees' Compensation Act and the government, whom she could not sue under the provisions of that Act, was considered jointly at fault. The doctrine of the *Martello* case was applied to reduce her recovery against a third party by 50% to avoid the inequity resulting from the circumstances that contribution from the government was not legally available to the third party.

In *Dawson v. Contractors Transport Corp.*,[90] a similar situation arose under the Longshoremen's and Harbor Workers' Compensation Act, the general private employers' compensation act of the District of Columbia. The court

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[88]300 F.2d 721 (D.C. Cir. 1962).

[89]405 F.2d 1361 (D.C. Cir. 1968).

[90]467 F.2d 727 (D.C. Cir. 1972).

there held the doctrine of the *Murray* case applicable under the Act and analyzed it as a general equitable doctrine in the context of workmen's compensation claims. (The precise question presented was whether the issue was to be decided by a jury, and the determination was that it was an equitable question for nonjury determination.)

While the underlying equitable principle of these cases is correct, the result of applying the rigid 50-50 rule of the District of Columbia, rather than the more flexible and responsive maritime rule of proportional fault, could in many cases produce unfairness, which is avoided under the rule of the court below. The *Dawson* case belies the statement in *Amicus* Liberty Mutual Insurance Company's Brief (p. 28) that "apportionment" is not provided under the Act between the employer and third-party tortfeasors other than shipowners, a statement which also misses the point that we are considering here the terms of an amendment intended to provide special relief in connection with recognized problems relating to shipowners' liabilities.

4. The Rule Is Equitable in All Respects

The result reached below not only promotes safety and uniformity; it also avoids the injustice of the contrary result. The inequity resulting from the imposition of liability for the stevedore's negligence was acknowledged even by the Ninth Circuit in the *Dodge* and *Shellman* decisions.[91] It has been especially deplored by district courts, who are closest to the realities of the situation and unable as a result of current doctrine in their circuits to make reasonable adjustments of liability in the circumstances with which they intimately deal. The district judge said in *Crowshaw v. Koninklijke Nedlloyd, B.V. Rijswijk.*[92]

> The inequities of this program are obvious. If the stevedore were 90% negligent, the 10% negligence of the shipowner would be sufficient to cripple him with the entire judgment. . . .
>
> . . . .
>
> The manifest injustice of subjecting a joint tortfeasor to an arbitrary level of damages despite minimum culpability was condemned by the U. S. Supreme Court [in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975)].

In the trial court below, the district judge said:

> In the light of this authority [citations, including *Dodge* and *Shellman*], we, *reluctantly*, reverse our previous stand. It now appears that a 20% negligent shipowner must bear the entire brunt of the damage award without contribution from a 70% negligent employer-stevedore, who not only pays not one cent but recovers the compensation benefits paid the employee. We invite the Court of Appeals of this Circuit to examine this matter.[93]

The rule applied to the damages below is correct because it, and it alone, assures equitable results, reducing recovery, under maritime principles by the percentage of total negligence attributable to the injured longshoreman and other employees of the suing stevedore. The rough

[91] *Dodge v. Mitsui Shintaku Ginko K.K.*, 528 F.2d 669, 672, 1975 A.M.C. 2462, 2467 (9th Cir. 1975); *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 680, 1975 A.M.C. 2471, 2478-79 (9th Cir. 1975).

[92] 398 F. Supp. 1224, 1232, 1233, 1975 A.M.C. 2630, 2640, 2641 (D. Or. 1975).

[93] *Edmonds v. Compagnie Generale Transatlantique*, 1976 A.M.C. 1027, 1030 (E.D. Va. 1976) (not otherwise reported).

justice of the District of Columbia cases would not apply. The reasoning of this Court in *United States v. Reliable Transfer Co.* [94] would indicate that the general application of the proportional rule to maritime cases of shared responsibility is all but settled and it is in the tradition of admiralty to recognize the equitable rule applied by the court below.

The result would be the same in a case of statutory assignment to the employer as in any other case. The statutory assignment is in the nature of subrogation, which is equitable; the assignee of a chose in action has an "equitable ownership".[95] The doctrines of equity obtain in admiralty and therefore apply to maritime cases.[96] Accordingly, the shipowner would be entitled to have any recovery reduced not only by the percentage of the injured man's negligence, if any, but also to the extent that the suing party (the stevedore) had otherwise negligently caused the injury. This follows not only from the rule that no one should benefit from his own wrong but from the central principle of equity. Equitable principles will allow the defendant not only the defenses which he had against the assignor, but those based upon the assignee's conduct. Thus, for example, in the maritime context, the law limits recovery by an assignee to the amount which he paid to acquire the claim.[97]

[94]421 U.S. 397, 1975 A.M.C. 541 (1975).

[95]*Gruner v. New York Trust Co. v. United States*, 295 N.Y. 510, 68 N.E.2d 514, 167 A.L.R. 628, 638 (1946).

[96]*Watts v. Camors*, 115 U.S. 353 (1885); *Vaughan v. Atkinson*, 369 U.S. 527, 1962 A.M.C. 1131 (1962).

[97]*The PERTH AMBOY #2*, 110 F.2d 644, 1940 A.M.C. 621 (2d Cir. 1940); *The GULFSTREAM*, 64 F. 8-9 (2d Cir. 1894); *see The MARISKA*, 107 F. 989 (7th Cir. 1901); *The HUDSON*, 15 F. 162 (S.D.N.Y. 1883). We do not suggest that the rule of limitation to purchase price would itself be applicable in the circumstances of a workmen's compensation claim, because of the employee's statutory interest in the residue of any recovery and the employer's consequent status as a trustee, but the authorities on the point illustrate the operation of equity and the availability of defenses peculiar to the assignee.

In our view, a harmonious approach to the problem of the employer's recovery is reached by the consistent application of the equitable doctrine which we have so far advocated. The fund is to be distributed on equitable principles, *pro rata*, to the parties interested in it. The result is that the employer receives back exactly the fair portion of his past compensation expenses attributable to the third-party negligence and, while the worker's immediate recovery is thereby reduced, he is dollar for dollar that much closer to the threshold of new compensation benefits.[98] The same principle will, under this system, apply automatically to credits on future compensation. As the total third-party recovery is reduced for employer fault, the amount of credit on future compensation is ac-

[98]The authors of thoughtful law review articles, Cohen and Dougherty, *supra* note 9, and R. Coleman and W. Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation under the 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act*, 35 Md. L. Rev. 351 (1976), have advocated interpretations similar in major respects to those we urge, but propose to deny the employer indemnity for its compensation expense, in whole or in part, upon the basis of a different formula, *viz.*, reduction of the employer's recoupment by the dollar amount by which the judgment was reduced on account of employer negligence, apart from plaintiff's contributory negligence. This formula appears to turn on considerations of fault between employer and employee and thus create conflict of interest between them. Judge Skopil, in *Crowshaw v. Koninklijke Nedlloyd B. V. Rijswijk*, *supra* note 92, appears to endorse this proposal. Cohen and Dougherty also appear to advocate that vessels be permitted to implead employers in third-party actions; that is a procedure we consider wholly inappropriate and unnecessary, as we explain in III, *infra*.

cordingly reduced and the corresponding burden on the employer occasioned by its own negligence is not lifted from him by indemnification.[99]

B. The Arguments Urged Against the Ruling Below Are Without Merit

1. The Question Is Not at All Whether the Longshoreman Is to Be Well Compensated But Rather How the Burden of His Liberal Compensation Is to Be Borne

As the court below pointed out, the result was by no means harsh upon the longshoreman.[100] While the result below is probably less generous to lawyers than the result which petitioners seek, the decision involves no harshness or injustice to injured workmen. Petitioner's allegation of harsh inequity worked upon the longshoremen (Brief at 41) is unsupported by anything in the record or briefs here. It is insupportable for the generality of cases when one considers the liberal compensation benefits now provided under the Act,[101] and insupportable for this case, in particular, based upon the figures actually involved.[102]

[99]Where the employer brings the suit and distribution of proceeds is therefore controlled by the provisions of 33 U.S.C. § 933(e) authorizing the employer to retain past expenses and the present value of estimated or scheduled future compensation, a similar result should be reached by viewing the recovery fund as comprising two distinct, if presently unliquidated, interests and limiting the employer's distribution to itself to the value of its interest in the fund as reduced by the percentage of employer fault.

[100]577 F.2d at 1156, 1978 A.M.C. at 1675-76.

[101]E. Vickery, "Some Aspects of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act," 41 Ins. Counsel J. 63 n.3 (1974).

[102]As of the end of 1978, compensation benefits to Edmonds totalled about $49,500 (see *Amicus* Liberty Mutual Insurance Company's Brief at 2.) If Edmonds had recovered the full $90,000

The real question in the first instance is how far the primary burden of compensating the injured workmen can be shifted to the shipowner by an employer who is himself negligent. This shift occurs when the employee recovers unlimited damages and the employer, despite his negligence, is permitted to obtain a full recoupment of past payments and full credit for future ones. Such a shift also occurs by very reason of the encouragement given to third-party suits in preference to compensation, when such suits not only hold out the lure of large sums of ready money for the employee, but also stimulate the greed of his counsel upon a similar basis.

Of course it may be said, and indeed we have said,[103] that the economic burden ultimately comes to rest upon shipowners through the premiums they pay for the stevedores' compensation insurance as a major and discrete element of stevedoring rates and the premiums they pay in their own insurance for protection against damage. But the weight of this burden is affected by the directness and efficiency with which it is managed. There can be little doubt that the most direct and efficient management is through the compensation system so that the burden is carried in the stevedores' compensation premiums, which are passed on to the shipowner as one of his charges. Every time the burden is shifted over to the shipowner's own insurance,

($100,000 less 10% for his own contributory negligence), his attorneys' fees would surely consume one-third (a conservative estimate) or $30,000, leaving $60,000, and when other expenses of litigation at the trial court level alone were substracted from the remaining amount, Edmonds would surely have little if anything after repaying Liberty Mutual Insurance Company the $49,500 of compensation benefit. It is difficult to see how anyone but lawyers benefit from this state of affairs.

[103]See paragraph 2, Statement of Interest, *supra*.

it is done by a costly and inefficient litigation. Whether he wins or loses it, the shipowner has the added burden of attorneys' fees and other litigation expenses, and if the longshoreman "wins", the amount actually paid to the longshoreman and credited to his compensation may be only half or a little more of the judgment, after deduction for his own attorneys' fees and expenses. It was this burden of litigation expense together with its attendant burden on the courts which Congress hoped largely to alleviate by amending the Act.[104]

2. The Question Is Not One of "Joint and Several Liability", a Formula Not Involved Here

Petitioner invokes the formula of "joint and several liability" (Brief, p. 22) and, even more than the petitioner, some of *amici* dwell upon the notion as a guideline for the present issue. This formula, which is not a principle, but a conclusion reached in other circumstances, has no application here and as an analogy will not bear analysis. Even the policy which supports it in other circumstances will not support it here. It is presented here as a "buzz" phrase.

The expression has always been applied to the liability of joint tortfeasors for the damages suffered by their common claimant. And we see it thus correctly used in *Amicus* Association of Trial Lawyers of America's Brief (p. 5). But here we do not have joint tortfeasors liable for damages. We have one possible tortfeasor, the shipowner, liable for damages and another party, the stevedore-employer, liable for no damages for tort or any other reason but liable for compensation payments under a statutory schedule regardless of fault. So much for their several liabilities. As for joint liability, no one even contends that the shipowner is liable for compensation payments or that the stevedore employer is liable for damages. The expression is a complete misfit to the present case.

[104] See text at note 21, *supra*.

Petitioner's brief (p. 22) states:

> [I]f Congress did not change the previously followed rule of joint and several liability, then we can presume Congress intended that that rule continue in force and effect.

But there was no previous rule of joint and several liability, as the expression had no application to the situations of the parties. The brief of *Amicus* Association of Trial Lawyers of America, while incorrectly arguing from the formula of joint and several liability, does at least correctly state its meaning "that each one is liable for the whole damages" and cites cases as authority for that statement (p. 5). Distinguished counsel for *Amicus* Liberty Mutual Insurance Company has rightly denied that the stevedore is to be viewed as a tortfeasor and pointed out that there is no joint liability (Brief, p. 3) and thereafter, drops the word "joint" from the formula (Brief, pp. 5-7). What the reader is not expected to notice is that when the word "joint" disappears from the phrase, there is nothing left of it, since its only significance is to indicate that, although a liability be joint it may be collected in full from either debtor. To speak only about several liabilities is to speak of what is absolutely commonplace, that is, the distinctive, personal obligation of one party to another, unaffected by rights or claims either may possibly have against

a third. The use of the formula "joint and several liability" is an attempt to beg the question here, which is not whether the different liabilities of shipowner and stevedore can be collected from the other, but rather what is the several and distinctive liability of the shipowner, a liability in which the stevedore disavows joinder. *Amicus* then goes on to support the eviscerated formula with three well known cases of joint and several liability between tortfeasors actually jointly responsible for damages to an innocent party[105] and two cases involving no joint liability whatever, but only liability of a single party.[106]

A rule which imposes full liability on one of two or more negligent parties can instantly be recognized as unjust.[107] Two rationales for such an injustice have been proffered, and it may easily be seen that neither commands much force against the simple justice of the decision below. The first is that a rule of joint and several liability among tortfeasors assures adequate compensation of injured plaintiffs. The California Supreme Court recently held that the rule of joint and several liability survived the judicial declaration of comparative negligence. In so holding, the court described the function of the rule as follows:

> Finally, from a realistic standpoint, we think . . . abandonment of the joint and several liability rule

[105] *The WASHINGTON and The GREGORY*, 76 U.S. (9 Wall.) 513 (1870); *The ALABAMA and The GAMECOCK*, 92 U.S. 695 (1876); *Phoenix Insurance Co. v. The ATLAS*, 93 U.S. 302 (1876).

[106] *The CHATAHOOCHEE*, 173 U.S. 540 (1899); *The SUCARSECO*, 294 U.S. 394 (1935).

[107] There is obvious lack of sense and justice in a rule which permits the entire burden of an accident, for which two defendants were equally, unintentionally to blame, to be shouldered onto one alone . . . ." W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 427 (1937).

> would work a serious and unwarranted deleterious effect on the pratical ability of negligently injured persons to receive adequate compensation for their injuries. One of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such a case the rule recognizes that fairness dictates that the "wronged party should not be deprived of his right to redress," but that "[t]he wrongdoers should be left to work out between themselves any apportionment." *(Summers v. Tice* (1948) 33 Cal. 2d 85, 88.)[108]

The policy expressed by this quotation is a useful analogy in a workers' compensation setting only when the compensation benefits are inadequate. For example, before the 1972 Amendments, the compensation remedy was limited to $70 per week and a $24,000 maximum for partial disability.[109] Under such a system, concern that plaintiff have full recovery of traditional tort damages understandably outweighed concerns spawned of the desire for a just and precise allocation of fault. Imposition of significant liability on a minimally negligent defendant may be perceived as the better solution to the moral dilemma posed by the inadequacy of the compensation benefits. But today, potential plaintiffs in Edmonds' position come before the Court with less compelling justification for their assertion that they are entitled to full recognition of all their interests

[108] *American Motorcycle Association v. Superior Court*, 20 Cal. 3d 578, 590, 146 Cal. Rptr. 182, 189, 578 P.2d 899, 906 (1978).

[109] Act of July 14, 1961, Pub. L. 87-87 §§ 1, 3, 75 Stat. 203, formerly 33 U.S.C. §§ 906(b) and 914(m).

before the valid claims of others receive their due. The modern compensation claimant comes to court having received satisfaction for his claim for two-thirds of his lost wages, effectively supplemented by freedom from income taxation, and his claim for medical expenses. And he is further protected against inflation, taxes, medical expenses, rehabilitation expenses, and from the attorneys' fees, expenses, uncertainties and delays historically associated with adequate recovery for disabling injuries. The best parts of justice, compassion for the unfortunate and concern for the dignity of the family of the disabled, have been satisfied.

The 1972 Amendments have instituted qualitatively different levels of benefits satisfying the fundamental compensation purposes of accident law. To continue to resort to the rubric of "full compensation" is to ignore the substantial adequacy of the benefits, at the cost of safety on the waterfront and the further cost of avoidable injustice to defendants. The decision below is a just resolution of these competing interests and a denial of defendant's interests in deference to fuller compensation of plaintiff is not justified.

A second justification for the analogy to joint and several liability is said to be the absence of "any logical basis for apportionment".[110] While it is true that any injury caused by the concurrent negligence of the stevedore and the shipowner is as indivisable as any other injury with two causes, a basis for apportionment does exist. Liability may be apportioned among the negligent parties by comparing

[110]Prosser, *supra* note 117, at 432.

their negligence.[111] It is plain that the apportionment of liability on the basis of fault is preferable to the blind imposition of all of the liability on any one party, and hence it is a long-standing doctrine in the maritime law (in contrast to the common law) that even when a judgment is rendered against joint tortfeasors, it should provide for payment by each of only his proper share, unless and until it be shown that the other's share cannot be obtained from him.[112]

The concerns which might call forth the analogy to joint and several liability are no longer present in suits between the longshoremen and the vessel, and there is no cause to resort to such a rule and miss the opportunity to reach the just result.

The decision that the shipowner is not to be liable for the proportion of damages equal to the employer's negligence does not imply a general abandonment of the doctrine of joint and several liability among concurrent tortfeasors. The rule below does not require that a vessel, liable only for damages attributable to its own negligence, could or should reduce its damages on the ground that some other tortfeasor, whether present or absent, solvent or insolvent, should be pursued by plaintiff. Each non-employer party who was negligent may be held jointly and severally liable for damages assessed against non-employers.

[111]*United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 A.M.C. 541 (1975).

[112]*The VIRGINIA EHRMAN*, 97 U.S. 309 (1878); *The ALABAMA and The GAMECOCK*, 92 U.S. 695 (1876); *The WASHINGTON* and *The GREGORY*, 76 U.S. (9 Wall.) 513 (1870).

In sum, any attempt to apply a rule derived from the concepts of joint and several liability to the Longshoremen's and Harbor Workers' Compensation Act setting should be viewed with skepticism. The rule serves primarily to impose the risk of insolvency or absence of one defendant on another defendant instead of on the plaintiff. In the compensation scheme, immunity of the employer from suit may be reasonably analogized to absence or insolvency only when the compensation benefits are less than conscience demands. When those benefits are adequate, a rule further preferring the plaintiff is not necessary, and since the application of such a rule less effectively serves both justice and safety, there is no rational ground for choosing such a rule over the simple rule derived from modern concepts of comparative negligence.

3. The Question Involved Is Not of Contribution But Whether the Negligent Employer Is to Be Fully Indemnified

A result different from that reached below would mean that the stevedore, notwithstanding even its predominant fault, would be fully indemnified at the expense of the third party. This would open a new chapter in the book of inequities to succeed those of *Halcyon* and *Ryan*.

What the employer seeks out of the third-party action is to be made absolutely whole for its loss. If this is not a claim for indemnity, then neither were the shipowner's claims in the *Ryan* line of cases.[113] It has been said that the

[113] *See* Black's Law Dictionary 910 (4th ed. 1968): "Indemnify . . . to make good; to compensate; to make reimbursement to one of a loss already incurred by him"; and "Indemnity . . . a compensation given to make the person whole from a loss already sustained".

denial of full recovery to the negligent employer is an exaction of contribution forbidden by the statute. Under the rule announced below, the shipowner does not sue the stevedore nor claim from him any contribution whatever to the amount of damages which the shipowner is adjudged to pay the longshoreman. The stevedore would make no payment whatever, at any time, except payments of scheduled compensation benefits under the Act. To say that the denial of full indemnity to the negligent employer is an unlawful contribution on his part is a perversion of language.

It is a corruption of language also to say that the denial of full indemnity to the negligent stevedore violates the new provision of the Act that "the employer shall not be liable to the vessel for such damage." By those words the statute protects the employer from being required to contribute to a judgment of damages. But neither here nor elsewhere does the Act manifest a purpose to protect him from having to pay normal compensation benefits which may not be recoverable in full. Neither is there the slightest indication in the letter or the spirit of the Act that the employer should be fully indemnified despite its own fault. Even agreements between parties contemplating indemnity for one's own fault are required to be most explicit on that point to be effective.[114] We can imagine no reason why the rule as to statutes would be less stringent.

[114] "[A] contract provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." *United States v. Seckinger*, 397 U.S. 203, 211 (1970); *United States v. Nielson*, 349 U.S. 129, 131-32, 1955 A.M.C. 935, 937 (1955).

While it is true, as pointed out in the brief of *Amicus*, Liberty Mutual Insurance Company (p. 27), that this Court said the non-repayment of any compensation benefits under the circumstances presented in *Pope & Talbot v. Hawn*[115] "would be the substantial equivalent of contribution", the court did not make the mistake of saying that *Pope & Talbot* involved actual contribution.

The proposition rejected in *Pope & Talbot* was that a negligent shipowner[116] could totally deny a partially negligent employer all recovery on the compensation lien. This draconian result was proposed based upon no known legal theory. The closest analogy was contribution, which the Court had so recently rejected in *Halcyon*.[117]

The result urged here, however, is the imposition of liability on the shipowner based upon its percentage of negligence and the amount of plaintiff's damages, in accordance with long-accepted maritime principles. If this result bears any relation to contribution, it lies only in the fact that the stevedore's recovery leaves it with fewer dollars at the end. Actual contribution by the stevedore is never attained, for the stevedore never pays any money to the shipowner and can never be liable for more than the Act provides, regardless how great were its negligence and the resulting damage. Since actual contribution is not involved, since the result is not the same as that urged in *Pope & Talbot v. Hawn*, and since the equitable rule advocated here comports with the fundamental principles

[115] 346 U.S. 406, 412, 1954 A.M.C. 1, 9 (1953).

[116] That Pope & Talbot was negligent is made clear by the Court of Appeals opinion. *Hawn v. Pope & Talbot, Inc.*, 198 F.2d 800, 802, 1952 A.M.C. 1708, 1709 (3d Cir. 1952).

[117] Note 32, *supra*.

of maritime law and the policies of the Act, whatever strained comparison may be drawn to contribution is irrelevant.

III. THE RULE APPLIED BELOW SHOULD NOT MULTIPLY OR COMPLICATE PROCEEDINGS AND THE PRESENCE OF THE EMPLOYER AS AN ADDITIONAL PARTY SHOULD NORMALLY BE UNNECCESSARY

A. There Is But a Single Claim or Cause of Action Against the Vessel, Having the Same Elements Whether Brought By the Longshoreman or By His Employer

It must be clear from reading Section 33[118] that the Act, from the beginning, contemplated but one third-party claim against the vessel arising from an injury, a claim which was clearly in the hands of either the employee or the employer, depending on whether an assignment had occurred, and which existed primarily for the recoupment of the employer's compensation expense and was ordinarily expected to be prosecuted by him, as evidenced by the expressed provision for the allocation of the proceeds of his recovery and lack of similar provision for a recovery by the employee.

In time, however, the pressures on the pre-Amendment Act produced the rulings in *Czaplicki v. HOEGH SILVERCLOUD*,[119] and *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*[120] under which, in some circumstances, claims

[118] 33 U.S.C. § 933.

[119] 351 U.S. 525, 1956 A.M.C. 1465 (1956).

[120] 394 U.S. 404, 1969 A.M.C. 745 (1969).

could be presented by both the worker and his employer. The latter case created the further problem of a disparity of grounds and defenses between the claims.

As we have pointed out above, however, there is a growing line of authority[121] in the lower courts toward reconciling the duties of the vessel to the longshoreman and to his employer, and hence the grounds of claims by either of them, under the terms of the 1972 Amendments, so that no distinction should now exist in the substance of rights involved.

The section of the 1972 Amendments describing the reformed third-party action against the vessel concludes with a further new provision: "The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."[122] By this language and the absence from the Act of provision for any other remedies except for compensation benefits, Congress has melded the claims of employer and employee against the vessel, affirmed their singleness and unity, and put an end to the evil of concurrent or successive claims, whether under the doctrine of *Czaplicki* or that of *Burnside*.[123] This should be clearly recognized, particularly as there is no further need for separate claims under those doctrines. The abolition of indemnity by the 1972 Amendments eliminates the conflict of interest created by the *Ryan* case[124] and with it the reason for the *Czaplicki*

[121] Note 63, *supra*.

[122] 33 U.S.C. § 905(b).

[123] This view is in harmony with doctrine under the Federal Employee's Compensation Act. *See* 5 U.S.C. § 8131 and *Louisville & Nashville R.R. v. Rochelle*, 252 F.2d 730 (6th Cir. 1958).

[124] *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956).

ruling. The decision in *Moragne v. States Marine Lines, Inc.*,[125] eliminates resort to state death acts in maritime cases and thus the limitations upon recovery which gave rise to the *Burnside* case. Thus the *Burnside* case, like the *Halcyon* case, is left behind by history.

The joint interests in recovery can now be fully protected without resort to separate suits. In the case of recovery by the employer on an assigned claim, allocation is fully controlled by the statute, administered by the compensation authorities. When the employee sues, equitable principles are perfectly adequate to protect the employer. The employer's interest in the suit as a means of recouping its high compensation exposure is obvious, while the employee has an equally obvious interest in any part of a damage recovery which may prove to exceed that exposure. Where the one party sues, in large part for the benefit of another, upon the jointly held claim, and receives money for the account of the other, he is, under equitable doctrine, regarded as a trustee and held to account.[126] This is consistent with the line of cases previously cited, under which the employer's recovery out of proceeds in the hands of the employee is put on an equitable basis.[127] This view would also lead to a disposition of the attorneys' fee problem on a clear and predictable basis; there is ample precedent for taking out of the fund the legal expenses

[125] 398 U.S. 375, 1970 A.M.C. 967 (1970).

[126] *United States Fidelity & Guaranty Co. v. United States*, 152 F. 2d 46, 48, 1945 A.M.C. 1513, 1516 (2d Cir. 1945) ("[T]he assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee. . . .").

[127] See note 44, *supra*.

of creating it before allocating it among its beneficiaries[128] Thus, no matter whether the worker or the employer creates the fund, such fees and expenses should be taken off the top. Several courts have already reached this result.[129]

B. Only in Most Exceptional Circumstances Would There Be Any Occasion for Both the Longshoreman And His Employer to Be Parties in a Third-Party Action

The court below took special notice of the absence of the stevedore employer as a party.[130] Intervention by the stevedore might have facilitated full discussion of the issues presented. While that would have been, of course, entirely appropriate in the circumstances, such intervention will be found unnecessary and inappropriate in the administration of the rule in the normal case hereafter. And it is simply not true, as the brief of *Amicus* National Association of Stevedores says (p. 13), that "employer would be pitted against employee . . . in litigation."

The claim is one in which the longshoreman and his employer have a joint unliquidated interest. As a result of the harmonization of the shipowner's duties to both of them, the longshoreman plaintiff bringing suit upon the joint claims has on every issue the same interest as his

[128] *E.g., United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *United States v. Anglin & Stevenson*, 145 F.2d 622 (10th Cir. 1944); *see Sprague v. Ticonic Bank*, 307 U.S. 161, 166-67 (1939).

[129] *Valentino v. Rickners Rhederei, G.M.B.H.*, 552 F.2d 466, 1977 A.M.C. 1618 (2d Cir. 1977); *Swift v. Bolten*, 517 F.2d 368, 1975 A.M.C. 1515 (4th Cir. 1975); *Brown v. American Mail Line, Ltd.*, 437 F. Supp. 628, 1977 A.M.C. 2526 (D. Or. 1977); *contra Cella v. Partenreederei MS Ravenna*, 529 F.2d 15, 1976 A.M.C. 600 (1st Cir. 1975).

[130] 577 F.2d at 1156, 1978 A.M.C. at 1676.

employer. There is nothing novel about joint interests being so represented and all interested parties being bound by the results, where, as here, the party suing is properly situated, without conflict of interest, to represent the interests of all.[131] However, in our view the party suing, whether longshoreman or employer, is the trustee of the claim and it is certainly commonplace that the trustee has legal standing to represent and bind his beneficiary.[132] The practical side of the matter is that the conduct and circumstances to be examined in evaluating a longshoreman's third-party claim are affected little, if any at all, by raising the issue that other stevedore employees involved have been negligent.

A completely analogous situation arises when the employer brings suit and the contributory negligence of the employee is alleged. But no one supposes that it is necessary to bring in the employee by impleader or for him to intervene in a normal case. As a matter of common sense, the employer secures his cooperation as a person interested in the handling of that issue[133] and, equally as a matter of common sense, the employee will secure the assistance of the employer, as indeed he will do whether or not employer negligence is alleged.

The plaintiff should be viewed as a trustee and the interested employer, if it wishes, may routinely, in connec-

[131] This is familiar not only in class actions under Rule 23, Fed. R. Civ. P., but in other actions in the maritime context, as, for example, where the vessel owner may sue for collision on behalf of its cargo owners as well as itself and the owner of a salving vessel may likewise sue for salvage on behalf of its crew. *See* 2 *Benedict on Admiralty* § 249 (6th ed. 1940) and authorities there cited.

[132] *See* Rule 17(a), Fed. R. Civ. P.

[133] The employee's right to receive 80% of any excess judgment provides an interest in cooperating. 33 U.S.C. § 933(e).

tion with payment of compensation, make demand for notice should the issue of its negligence be raised in any third-party suit. The very most that should be expected, procedurally, is that, upon the presentation of an affirmative defense based upon the employer's negligence, the employee-plaintiff should tender the defense of such allegations to the employer, thereby placing the employer on notice and securing its assistance in the handling of the matter if, by chance, that were not already being provided. In the unusual case in which the employer felt its interests were inadequately represented in court, intervention would still be available upon appropriate allegations showing the need for it.[134]

Accordingly, the Court should not be misled by suggestions of procedural complication or multiplicity of suits.[135] The rule and principles urged here can, and should, be effectuated while preserving the simplicity and relative economy of the normal bilateral, or two-party, suit.

IV. ADOPTION OF THE RULE URGED HERE WILL FURTHER THE PURPOSES OF THE ACT, REDUCE FUTURE LITIGATION, AND MINIMIZE THE OCCURRENCE OF PROBLEMS IN RELATED AREAS

Compensation benefits under the Act do not result in placing a large lump sum in the injured employee's hands (a sum which is subject immediately to deduction of a high

[134]Rule 24(a), Fed. R. Civ. P. Such an intervention, if shown to be justified would probably affect the allocation of the plaintiff's attorneys' fees in prosecuting the action.

[135]*And see United States v. Reliable Transfer Co., supra* note 95, 421 U.S. at 407-08, 1975 A.M.C. at 550, where the Court rejects such an argument as an excuse for an unjust rule.

percentage for attorneys' fees and thereafter to the normal risk of prodigality). But, as a result of the 1972 Amendments, the benefits under the Act have been made truly liberal and provision has been made for their continued liberality in a changing economy. This has been accomplished principally by a formula basing disability benefits on 66⅔% of the worker's average weekly wage (free of taxation), with a maximum, determined from time to time, as a multiple of a current national average wage, while death benefits and other benefits have been similarly liberalized.[136] Moreover, the injured worker, under the compensation system, has the lifetime security of its medical benefits and liberal disability payments for later consequences of his injury, if he has not bargained that security away by entering into the settlement of a third-party lawsuit in the normal manner, which is to say without the written consent of his employer.

Third-party suits, of course, benefit the employer by recouping past expenses and by creating a credit against future compensation entitling him to deny further medical care or disability benefits until the amount of the credit is deemed exhausted. While the immediate lump sum in damages is often more attractive at the moment to the worker and especially to his lawyer, because of the fee the latter can thereby obtain, it is doubtful whether, in any but unusual cases, it is beneficial in the long run to the interests of the worker to prosecute a third-party action, the proceeds of which are subject to high attorneys' fees and

[136]33 U.S.C. §§ 906, 908-10. *See* H.R. Rep., *supra* note 20, at 4700-01. A convenient summary is also included in E. Vickery, *supra* note 101.

thereafter to the risk of investment loss and expenditure long before the credit threshold is crossed, entitling him once again (if he did not settle the case and lose his coverage) to receive compensation benefits.

Under a rule of proportionate liability, plaintiffs' attorneys will be very much less motivated to file suit where it can be seen that the major fault is the stevedore's. The rule will thus reduce litigation and tend to relieve crowded calendars and leave the courts more open to substantial, meritorious cases, while the injured workmen receive lifetime security under a generous compensation system.

The rule urged here will thus further the policies of the Act by providing both vessel and stevedore with measured incentives to safety and by withholding encouragement to a new wave of third-party actions and will replace the emphasis where it was always intended to be, upon compensation benefits.

It will give effect to current views on the distribution of loss and, for the first time in many years, establish an equitable relationship between shipowners and stevedores. It will harmonize the treatment of longshoremen and their employees under the Act with the treatment of the majority of workers and employees under the same Act and government employees and their employer under the companion federal Act.[137] It will harmonize the Act within itself by resolving the problem in the wording of section 5(b) under

[137] The same principle is applied even though the results in cases in the District of Columbia may be different because of the failure under local precedents to discriminate more finely than 50-50. When the practice in that respect changes in the District of Columbia, as it probably will, in keeping with current trends, results as well as principles will have reached agreement.

which otherwise an unacceptable disparity would exist between the treatment of claims by the longshoremen employees of independent contractors and those of shipowners.

Finally, if confirmed upon the equitable foundation which we urge, it will afford the means of avoiding in the future the past conflicts and confusion over the right to bring concurrent and successive suits, the time and parties involved in recovery of compensation expense and the allocation of attorneys' fees.

CONCLUSION

For the foregoing reasons, we submit that the judgment below should be affirmed.

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Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

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TABLE OF CONTENTS

PAGE

STATEMENT OF INTEREST OF AMICI CURIAE 2

QUESTION PRESENTED 2

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. Introduction 6

II. Fair apportionment of financial responsibility among shipowners, stevedores and injured longshoremen is best accomplished by application of an "Equitable Credit" 10

III. The general maritime law favors apportionment of fault 13

IV. Attacks made by petitioner and his supporting *amici* on the opinion below are unsound 15

A. The Court should not defer to Congress 15

B. Joint and several liability has no application to this case 23

C. Adoption of an Equitable Credit will not give rise to "Tripartite Litigation" 27

D. Application of an Equitable Credit does not impose unjustified financial burdens on injured longshoremen or their employers 30

1. The injured worker 31

2. The employer 34

V. Permitting negligent stevedores to recover their entire compensation liens from third-party judgments would de-

PAGE

feat two major legislative goals of the 1972 amendments 40

A. Negligent stevedores entitled to full lien recovery would have diminished incentive to maintain effective safety programs 40

B. Full lien repayment would discourage stevedores from partial waivers to effect settlements and would prompt a proliferation of litigation 41

CONCLUSION 44

TABLE OF CITATIONS

Cases

Afran Transport Co. v. S/T Maria Venizelos, 450 F. Supp. 621 (E.D. Pa. 1978) 14

Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394 (1935) 25

The Alabama and the Gamecock, 92 U.S. 695 (1876) 25

Bledsoe v. Scheepvaart Maats-Trans-Ocean B.V., Civil No. K-78-552 (D. Md. 1978) 28

The Bright Star, 4 F. Cas. 139 (No. 1880) (C.C.D. Mo. 1868) 19

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Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) 21

The Catherine v. Dickinson, 58 U.S. (17 How.) 170 (1855) 22

The Chattahoochee, 173 U.S. 540 (1899) 25

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 3, 13, 20, 27, 39, 45, 2a

PAGE

Creole Shipping, Ltd. v. Diamandis Pateras, Ltd., 410 F. Supp. 313 (S.D. Ala. 1976) 14

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Czaplicki v. The SS Hoegh Silvercloud, 351 U.S. 525 (1956) 22

Davillier v. Cavn Venezuelan Line, 407 F. Supp. 1234 (E.D. La. 1976) 35

Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) 20, 31, 44, 45

Dow Chemical Co. v. M/V Gulf Seas, 428 F. Supp. 667 (W.D. La. 1977) 14

Edmonds v. Compagnie Generale Transatlantique, 558 F.2d 186 (4th Cir. 1977) 8, 33, 34, 35

Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153 (4th Cir. 1978) ..7, 8, 26, 28, 3a

The Etna, 138 F.2d 37 (3d Cir. 1943) 13, 35

Fernandez v. Moore-McCormack Lines, Inc., Civil No. H-78-556 (D. Md. 1978) 28

Fernandez v. Scheepvaart Maats-Trans-Ocean B.V., Civil No. B-78-555 (D. Md. 1978) 28

Fitzgerald v. United States Lines, Co., 374 U.S. 16 (1963) 20

Frasca v. Prudential-Grace Lines, 394 F. Supp. 1092, 1975 A.M.C. 1130, 1143 (D. Md. 1975) 10, 31, 32, 6a, 7a

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Griffith v. Wheeling-Pittsburgh Steel Corp., 452 F. Supp. 841 (W.D. Pa. 1978) 3a

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) 20

PAGE

Hanover Ins. Co. v. Puerto Rico Lighterage Co., 553 F.2d 728 (1st Cir. 1977) 14

Harris v. American Investment Co., 523 F.2d 220 (8th Cir. 1975) 15

Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968 (5th Cir. 1978) 15

Hubbard v. Great Pacific Shipping Co., Monrovia, 404 F. Supp. 1242 (D. Ore. 1975) 18

Jones v. Rederai A/B Soya, 31 F.R.D. 524 (D. Md. 1962) 29

The Lottawanna, 88 U.S. (21 Wall.) 558 (1875) . 19

Marant v. Farrell Lines, 550 F.2d 142 (3d Cir. 1977) 43

Master Shipping Agency, Inc. v. M/S Farida, 571 F.2d 131 (2d Cir. 1978) 14

The Max Morris, 137 U.S. 1 (1890) 13

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 22

Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977) 36

Olczak v. Dinaco Compania De Navegacion, S.A., Civil No. M-78-554 (D. Md. 1978) 28

Olivas v. United States, 506 F.2d 1158 (9th Cir. 1974) 39

Pan-Alaska Fisheries v. Marine Const. & Design Co., 565 F.2d 1129 (9th Cir. 1977) 14

Phoenix Ins. Co. v. The Atlas, 93 U.S. 302 (1876) 25

Poleski v. Moore-McCormack Lines, 21 F.R.D. 579 (D. Md. 1958) 29

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 7

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956) 5, 6, 7, 21, 37

Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978) 31, 45

PAGE

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 6, 7

Shellman v. United States Lines, Inc., 1975 A.M.C. 362 (C.D. Calif. 1974) 4a, 5a

Shellman v. United States Lines, Inc., 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1976) 20, 31, 33, 44, 45, 4a, 5a

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 19

Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974) 15

The Thomas Barlum, 293 U.S. 21 (1934) 19

Trevellick v. Flota Mercante Grancolombiana S.A., Civil No. C-77-1604-WHO (N.D. Cal. 1979) 44

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 3, 4, 13, 14, 15, 19, 21, 22, 25, 27, 30, 39, 43, 45

Vana Trading Co. v. SS Mette Skou, 415 F. Supp. 884 (S.D.N.Y. 1976) 14

Vaughan v. Atkinson, 369 U.S. 527 (1962) 21

The Washington and The Gregory, 76 U.S. (9 Wall.) 513 (1870) 25

Wetters v. Moore-McCormack Lines, Inc., Civil No. H-77-858 (D. Md. 1978) 28

Weyerhaeuser Steamship Co. v. Nacirema Operating Co., 355 U.S. 563 (1958) 7

White v. Moore-McCormack Lines, Inc., Civil No. Y-78-553 (D. Md. 1978) 28

Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978) 24

Statutes

U.S. Const. art. I, § 8 19

U.S. Const. art. III 19

U.S. Const. art. III, § 2 19

PAGE

Death on the High Seas Act, 46 U.S.C. § 761 *et. seq.* (1976) 13, 22

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-1680 (1970) 39

Jones Act, 46 U.S.C. § 688 (1970) 13

33 U.S.C. §§ 901 *et seq.* (1976), amending 33 U.S.C. §§ 901 *et seq.* (1970) 2

33 U.S.C. § 903(a) (1976) 22

33 U.S.C. § 905 (1970) 8

33 U.S.C. § 905(a) (1976) 8, 36

33 U.S.C. § 905(b) (1976) 27

33 U.S.C. § 908(a) (1970) 6a

33 U.S.C. § 908(b) (1970) 6a

33 U.S.C. § 908(c) (1970) 6a

33 U.S.C. § 932 (1976) 25

Rules

Fed. R. Civ. P. 24 28

Miscellaneous

Note, *Apportionment of Damages Under 1972 Amendments to Longshoremen's and Harbor Workers' Act,* 52 Tul. L.R. 602 (1978) 34

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Brussels Collision Convention of 1910 22

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PAGE

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Charles Dickens, *Oliver Twist,* Chapter 51 45

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H.R. Rep. No. 92-1441, U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess. 4698 (1972) 18, 40, 41, 42

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Restatement of Restitution § 162 (1937) 35

D. Robertson, *Admiralty and Federalism* 142-45 (1970) 19

V. Schwartz, *Comparative Negligence* (1974) 13

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae consist of twenty-two individual American steamship companies whose operations are nationwide. Their brief in support of Respondent, Compagnie Generale Transatlantique, is filed with the consent of counsel for the Petitioner and counsel for the Respondent dated, respectively, September 8 and September 11, 1978, and filed herein, a copy of which was appended to *amici curiae's* Brief in Support of the Petition for Writ of Certiorari.

Amici curiae are representative of American and foreign steamship companies which do business in the United States and are exposed to personal injury claims by waterfront workmen brought pursuant to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), *amending* 33 U.S.C. §§ 901 *et seq.* (1970).

The vessel owners which comprise *amici curiae*, as well as all vessel owners similarly situated, are vitally interested in an interpretation of the amended Longshoremen's Act that will require the financial burdens of an injury-producing waterfront accident to be apportioned equitably between the parties responsible for it. Such an interpretation will harmonize this Court's current views on loss distribution in maritime cases with the broad purposes of the 1972 Amendments to provide harbor workers with ample benefits and long-term security.

QUESTION PRESENTED

Where the jury found the shipowner 20% responsible, the stevedore 70% responsible, and the injured longshoreman 10% responsible for causing a waterfront accident, was the court below correct in apportioning the financial burden by limiting the shipowner's liability to its percentage of fault?

SUMMARY OF ARGUMENT

The 1972 amendments to the Longshoremen's Act have finally made it possible for courts to distribute the financial burdens of a waterfront personal injury in proportion to the fault of the parties who caused it. Proportionate distribution in the circumstances of this case will represent the last step necessary to put into effect this Court's views on the maritime rule of comparative negligence in cases involving personal injury, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and collision, *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), when waterfront accidents are caused by the concurring negligence of two or more parties.

Under the 1972 amendments, a stevedore is no longer required to indemnify a concurrently negligent shipowner. The stevedore's financial exposure is expressly limited to the payment of workmen's compensation benefits. However, its statutory immunity both from suits by injured employees and indemnity actions by third parties does not excuse it from all financial responsibility for a waterfront accident for which it has been found at fault to some degree. That was the situation here. The employer was found 70% at fault, the vessel owner 20% and the injured longshoreman 10%. That being so, the amended Longshoremen's Act requires apportionment of the financial burdens of the accident by the three responsible parties.

The application of what has come to be known as an "Equitable Credit" is the best way to implement this Court's stated view that damages should be divided in proportion to fault "whenever possible."[1] It requires the vessel owner to pay damages in exact proportion to its percentage of fault. It requires no more from the

[1] *United States v. Reliable Transfer Co.*, 421 U.S. at 411. The full quotation appears at p. 45, *infra*.

statutorily protected stevedore than its maximum exposure in compensation benefits, and less if its fault is slight. The injured worker has always been required to bear the consequences of his own contributory negligence and that is unchanged by the 1972 amendments. The worker can only benefit financially from vessel fault because he can never receive less than he is entitled to receive in statutory compensation benefits.

Congress intended for the courts to decide what should be done when an accident, such as this one, was caused by concurrent fault of the vessel owner and the employer although the statute does not specifically address itself to the point. The legislative history makes it quite clear that the vessel owner is not required to pay damages for the faults of the stevedore any more than it is required to pay damages to an injured longshoreman for his contributory negligence. Thus, this is not the sort of case that should be referred back to Congress for legislative action but is one which should be decided by this Court which traditionally takes the lead in the law maritime as it did in *Reliable Transfer.*

The doctrine of joint and several liability has nothing whatever to do with this litigation despite the contention that it was ignored, in fact abrogated, by the court below. Joint and several liability contemplates two defendants, each of whom is a tortfeasor answerable to the plaintiff in damages. The employer here cannot be considered a joint or any other kind of tortfeasor because its tort liability was removed by statute. It is meaningless to say that with the employer's tort liability removed by statute, the shipowner is thereby rendered "severally" liable. There is no other party with whom it can be severally liable.

Neither an apportionment of fault nor the application of an Equitable Credit will promote tripartite litigation because the stevedore's interests are always protected

by counsel for a personal injury plaintiff. The plaintiff's entire case depends upon his proving that the responsibility for his accident was that of the vessel owner rather than the employer in order to establish initial liability and to prevent possible reduction of his recovery through the application of a credit. The plaintiff's witnesses will be employees of the stevedore, whether or not the stevedore is actually involved in the litigation. Dual representation is entirely unnecessary.

Apportionment of fault works no financial burden on the stevedore or its carrier because the costs of insurance are passed directly to the vessel owner in the stevedoring rates. The inequity of a reverse-*Ryan*[2] indemnity sought by *amicus* Liberty Mutual Insurance Company, the compensation carrier for the stevedore which was 70% at fault, is quite apparent. The amended Act was not designed to provide windfall recoveries to negligent stevedores.

Full lien recovery by a substantially negligent stevedore defeats the incentive for promoting safety measures stressed in the legislative history. It is also true that if an employer, or its carrier, senses that some fault, be it ever so slight, can be shown on the part of a third party, the stevedore will be unwilling to participate in settlement negotiations which may diminish its lien recovery. Increased litigation will result, because a slightly negligent vessel owner will be forced to go to trial in the hope of avoiding liability altogether. Application of an Equitable Credit will apportion the financial burdens fairly, promote safety, and encourage settlements.

[2] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956).

ARGUMENT

I.

INTRODUCTION

The court below held that the Respondent shipowner was liable only for its share of the damages suffered by Petitioner in a waterfront accident caused concurrently by the 70% fault of his employer, the 20% fault of the shipowner, and petitioner's own 10% contributory fault. For a variety of reasons, Petitioner and *amicus* Association of Trial Lawyers of America argue that the 20% negligent Respondent pay Petitioner 90% of his damages,[3] while *amici* National Association of Stevedores and Liberty Mutual Insurance Company assert that the 70% negligent employer, or its compensation carrier, be fully indemnified and made completely whole from Petitioner's third-party recovery. Urging that with "new and effective defenses" the inequity of the pre- and post-*Sieracki*[4] days no longer exists for the vessel owner, the stevedore and compensation carrier now ask this Court that they be accorded a reverse-*Ryan*[5] indemnity whereby *any* fault, be it ever so slight, on the part of the vessel owner result in full indemnity, in the form of reimbursement of compensation benefits, to the concurrently negligent stevedore or its carrier. However, just as *amicus* Liberty Mutual argues that Congress could not have intended to limit lien recoveries by employers while burdening them with the increased cost of compensation benefits,[6] it is unthinkable that Congress intended, by the 1972 amendments to the Longshoremen's Act, to move backwards from a

[3] Reduced only by the finding below that Edmonds was 10% contributorily negligent.

[4] *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

[5] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 133-34 (1956).

[6] Brief of Liberty Mutual Ins. Co. at 29 *et seq.*

rule inequitable to stevedores to an earlier, discarded rule, similarly inequitable to shipowners.[7]

Prior to November 26, 1972, the effective date of the 1972 amendments, shipowners warranted the seaworthiness of their vessels to longshoremen performing work on board.[8] Whenever a longshoreman was injured due to unsafe conditions aboard the vessel, the shipowner was held absolutely liable for all proven damages, reduced only by the plaintiff's own contributory negligence.[9] This liability existed even though the unsafe condition was unknown to the vessel's crew and was brought about solely by a stevedoring company hired to load or unload the vessel. Shipowners resisted the inequity of such a result, and this Court subsequently held that shipowners were entitled to indemnification from the stevedore employing the injured longshoreman if the stevedore had breached its so-called "warranty of workmanlike service."[10] Indemnity was permitted even when the shipowner was concurrently at fault, unless such negligence had prevented the stevedore from performing its duties in a workmanlike manner.[11] Despite the exclusivity provision of the

[7] The Fourth Circuit, sitting below *en banc,* agreed:

> [I]t is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedore very greatly so.

577 F.2d 1153, 1155, Petitioner's Appendix at A56-57.

[8] *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94-98 (1946).

[9] *Id. See Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953), especially the concurring opinion of Mr. Justice Frankfurter, 346 U.S. at 415.

[10] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 133-34 (1956). Under this theory, the stevedore was required to reimburse the shipowner for all damages recovered by the longshoreman, together with the shipowner's costs of defense.

[11] *See Weyerhaeuser Steamship Co. v. Nacirema Operating Co.,* 355 U.S. 563 (1958).

Longshoremen's Act,[12] stevedores were thus subjected to liability far in excess of their compensation obligations, and negligent shipowners avoided any financial responsibility aside from indirect payment through increased stevedoring charges. The inequity had passed from shipowner to stevedore and was a significant factor leading to the 1972 amendments.

Congress, by the passage of the 1972 amendments to the Longshoremen's Act, has now set the stage for judicial apportionment of responsibility in the form of a credit when a third party (Respondent shipowner here) and the employer (*amicus* Liberty Mutual's insured) are found concurrently at fault for an injury-producing accident. Such a credit has two basic aspects:

1. limitation of the shipowner's liability to its percentage of fault and
2. disposition of the employer's compensation lien.

The Fourth Circuit below adopted the first principle, but declined to rule on the second because the stevedore was absent. Both opinions of the Fourth Circuit below, however, recognized the importance of lien considerations to any overall resolution of this litigation.[13] *Amicus* Liberty Mutual Insurance Company's basic position is that even though its insured was found 70%

[12] 33 U.S.C. § 905 (1970), now 33 U.S.C. § 905(a) (1976).

[13] In the original majority panel decision below, 558 F.2d 186 (4th Cir. 1977), Judge Widener said:

> While the stevedore is not a party to this case, its lien looms large in any decision we may make here.

558 F.2d at 192, Petitioner's Appendix at A39. In the *en banc* decision, 577 F.2d 1153 (4th Cir. 1978) Chief Judge Haynsworth stated:

> The answer to the question [disposition of the lien] will affect the stevedore involved here and other stevedores very substantially, and its rights should not be adjudicated without its presence.

Id. at 1156, Petitioner's Appendix at A60-61.

at fault by a district court jury, it is nevertheless entitled to be indemnified 100% for compensation benefits paid Petitioner at the expense of the 20% negligent shipowner. Although invited to do so, it did not participate in this litigation at either the trial or appellate level[14] and even though lien disposition was considered at every level of the proceedings in this litigation,[15] the *en banc* decision below left lien disposition undecided because the employer was not represented.

Both Petitioner and *amicus* Liberty Mutual take the position that lien disposition is not before the Court,[16] a radical departure from Liberty Mutual's position in its brief in Support of Petition for Writ of Certiorari, at p. 4:

> Any decision which, like that of the Court of Appeals below, limits the recovery by an insurance carrier from a third party of its "workmen's compensation lien" is of direct and important interest to *amicus*.[17]

The Fourth Circuit's reason for deferring a decision on lienor's rights no longer exists. The stevedore,

[14] See letter exchanges between counsel for the vessel owner and Liberty Mutual Insurance Co., reproduced in Appendix, *infra*, at pp. 8a-13a.

[15] The assertion in Petitioner's and *amicus* Liberty Mutual's Answer to Motion for Additional Time for Argument on lienor's rights, that the subject was first raised at this level of the proceedings, is not correct.

[16] Answer to Motion for Additional Time for Argument; *amicus* Liberty Mutual's brief, 1, 2.

[17] It is rather interesting to note Liberty Mutual's position expressed in its brief on the merits at page 7: "Petitioner should have judgment for $90,000, and the District Court can then decide in the interpleader case what lien rights this *amicus* has." In its own mind, however, Liberty Mutual has already resolved the dispute. At page 7 of its brief in support of the petition for writ of certiorari Liberty Mutual has stated that "if Petitioner prevails in this Court *amicus* should recover $46,943.39 plus the amount of future benefits paid, whereas if Respondent prevails *amicus* would recover only $20,000. . . ."

through its insurance carrier which has paid compensation benefits, is before the Court and has fully briefed its position. This Court now has the opportunity to promote its policy of equitable distribution of loss in maritime accidents by affirming the decision below, with clear guidelines to the district court now considering distribution of the $20,000 judgment, that the application of an Equitable Credit should govern its decision.

II.

FAIR APPORTIONMENT OF FINANCIAL RESPONSIBILITY AMONG SHIPOWNERS, STEVEDORES AND INJURED LONGSHOREMEN IS BEST ACCOMPLISHED BY APPLICATION OF AN "EQUITABLE CREDIT."

In *Frasca v. Prudential-Grace Lines,* 1975 A.M.C. 1130, 1143 (D. Md., 1975),[18] a post-1972 amendment longshoreman's personal injury case, the jury found the shipowner, stevedore and injured longshoreman all at fault. The district judge applied what he termed an "Equitable Credit," *id.* at 1144, by which the shipowner's liability was limited to its relative percentage of fault in causing the injuries and the stevedore was not permitted to recover the compensation benefits it had paid. The credit was based on the following propositions:

> [1] An employee injured in the course of his employment recovers workmen's compensation benefits from his employer, regardless of fault. If the injury was not contributed to by the negligence of any third party, he recovers nothing more than these compensation benefits.
>
> [2] If the injury was caused by the fault of a third party, the employee may sue such third party

[18] The district court's initial opinion, reported in 1975 A.M.C. at 1143, concerns only the application of an Equitable Credit and is not reported elsewhere. The court's second opinion, granting the shipowner's motion for judgment n.o.v., is reported at 394 F. Supp. 1092, 1975 A.M.C. 1130.

for common law damages. His recovery is to be reduced to the extent of his own contributory negligence. And, if the employer was not also at fault, the full amount of all compensation benefits is to be deducted from the employee's recovery and paid to the employer in reimbursement.

[3] If the employer was a joint tortfeasor, it could be impleaded or otherwise bound by the third party. However, in such a case, the actual dollar liability of the employer should not exceed the amount of the employer's dollar liability in compensation. Just as every employee will be guaranteed *minimum* benefits of workmen's compensation, so will every employer be guaranteed a *maximum* liability of compensation benefits, whether directly or indirectly, for any employee's industrial accident.

The proportional amount of any employer's fault is to go in mitigation of the third party's damages, in the same fashion as the employee's contributory negligence, so that the third party actually responds to the employee only for that amount of the employee's damages as is equal to the third party's proportion of the fault.

[4] From any recovery the employee obtains from the third party, the employee is to reimburse the employer for the compensation benefits paid. However, if any employer negligence resulted in a diminution or reduction of the employee's recovery against the third party, the employee may deduct and retain that amount from the compensation benefits to be reimbursed.

Thus, if the damages attributable to the employer's fault were less than the amount of the compensation benefits, the employer would recover only the difference between the amount of the compensation benefits and the amount by which its fault reduced the employee's recovery. If the employer's fault were in excess of the compensation benefits, it would not receive any reimbursement, but neither would it be liable for any excess. In such situation the loss to the employee is the consideration for the absolute right to compensation benefits regardless of fault.

Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587, 606-07 (1974).[19]

Where a longshoreman's injury is not in any way caused by the negligence of a vessel, his sole recourse is workmen's compensation payments under the Longshoremen's Act. Conversely, when a shipowner is solely at fault, it will be liable for the entire amount of the longshoreman's damages from which the stevedore will recover all monies paid in compensation benefits.

It is in the area of mutual fault by the shipowner and stevedoring-employer, with or without fault on the part of the injured worker, that the Equitable Credit comes into play. The heart of the Equitable Credit is the proposition that a negligent third party can only be held liable for that portion of total proven damages which equals his proportionate fault.[20] Application of an Equitable Credit can hardly be considered unfair to any of the parties affected. The injured longshoreman can only benefit financially when vessel fault is proven because under no circumstances may he receive less than his entitlement in workmen's compensation benefits. The vessel owner must pay damages measured by its percentage of fault. The stevedore's maximum exposure is statutory compensation payments and may be less if its fault is slight. The palpable injustice of requiring the vessel owner to pay full damages when the employer is largely at fault is avoided.[21]

[19] The authors are both admiralty practitioners, one of whom represents shipowners and the other stevedoring employers.

[20] The mathematical mechanics of the Equitable Credit are demonstrated by examples set out in the Appendix hereto, at pp. 1a-7a.

[21] Equitable Credit is not the only formula by which responsibility for damages suffered by an injured longshoreman may be apportioned between concurrently negligent shipowners and stevedores. Distinguished admiralty lawyers from other jurisdictions, primarily John R. Brooke, Esquire, of Messrs. Wood, Wood, Tatum, Mosser & Brooke, Portland, Oregon; Graydon S. Staring, Esquire, of Messrs. Lillick, McHose & Charles, San Francisco, California; and E. D. Vickery, Esquire, of Messrs. Royston, Rayzor, Vickery & Williams, Houston, Texas, have urged a somewhat different formula termed the "Etna Subrogation Approach," so named because it stems from an application of the principle enunciated by the Court of Appeals for the Third Circuit in *The Etna,* 138 F.2d 37 (3d Cir. 1943). This is the method espoused by *amicus* Pacific Merchant Shipping Association in its brief at text for fn. 98. Other methods may be possible. However, only the propriety of a credit is now before this court — not its mechanics. That subject could properly be left for future analysis in the district courts.

III.

THE GENERAL MARITIME LAW FAVORS APPORTIONMENT OF FAULT.

The general maritime law has long been a leader in the promulgation of equitable rules apportioning liability for losses caused by the concurrent fault of two or more parties. The doctrine of comparative fault was entrenched in admiralty before it became the law of any state.[22] Its application was broadened in two recent Supreme Court cases articulating the policies in maritime law underlying the apportionment of liability according to fault. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106 (1974), extended the rule permitting contribution among joint tortfeasors to non-collision cases. *United States v. Reliable Transfer Co.,*

[22] *See, The Max Morris,* 137 U.S. 1 (1890). Prior to 1931 when the Wisconsin legislature passed a comparative fault law, only Mississippi (1910) and Georgia (1913) had adopted rules of comparative fault, and those came into existence in order to deal with specific problems. The rapid increase in the number of comparative law jurisdictions has been in large part a development of the last decade. *See generally,* V. Schwartz, *Comparative Negligence* 1-3, 11-17 (1974). In contrast, The Jones Act, 46 U.S.C. § 688 and the Death on the High Seas Act, 46 U.S.C. § 761, both enacted in 1920, provide for comparative negligence.

421 U.S. 397 (1975), then replaced the rule in collision cases of dividing damages equally, whenever both vessels were at fault, with one allocating liability in direct proportion to the fault of each vessel. The rationale for both decisions was a policy decision that whenever possible parties should pay for the consequences of their wrongs.[23]

Petitioner and his supporting *amici curiae* attack all reference to *Reliable Transfer* on the theory that it was decided after the 1972 amendments, and thus could not have been within the contemplation of Congress when the amendments were enacted. This totally ignores the basic nature of legislation. General principles of maritime law have evolved over the centuries and are constantly brought up to date by the judiciary. Against this background, Congress legislates in piecemeal fashion where a specific need is recognized. The general maritime law is displaced only to the extent necessary to give effect to precise statutory provisions. Where Congress is silent, the general maritime law applies. Thus, in filling in gaps left by the 1972 amendments, the Court must apply the general maritime law *as it*

[23] *See* Coleman and Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 35 Md. L. Rev. 351, 362-65 (1976). The principle enunciated in *Reliable Transfer* has since been applied to a variety of non-collision disputes. *See Hanover Ins. Co. v. Puerto Rico Lighterage Co.*, 553 F.2d 728, 730 (1st Cir. 1977) (negligent towage); *Dow Chemical Co. v. M/V Gulf Seas*, 428 F. Supp. 667, 673 (W.D. La. 1977) (negligent towage); *Afran Transport Co. v. S/T Maria Venezelos*, 450 F. Supp. 621, 636 (E. D. Pa. 1978) (grounding); *Creole Shipping, Ltd. v. Diamandis Pateras, Ltd.*, 410 F. Supp. 313 (S.D. Ala. 1976) (negligent mooring); *Master Shipping Agency, Inc. v. M/S Farida*, 571 F.2d 131, 133 (2d Cir. 1978) (negligent stowage); *Pan-Alaska Fisheries v. Marine Const. & Design Co.*, 565 F.2d 1129, 1133 (9th Cir. 1977) (fire); *Vana Trading Co. v. SS Mette Skov*, 415 F. Supp. 884, 888 (S.D.N.Y. 1976) (cargo claim).

now exists.[24] While this is particularly true in admiralty,[25] federal courts construing other federal statutes have frequently looked to cases decided after passage of the legislation in question to obtain guidance in their statutory construction.[26]

IV.

ATTACKS MADE BY PETITIONER AND HIS SUPPORTING *AMICI* ON THE OPINION BELOW ARE UNSOUND

A. *The Court Should Not Defer to Congress.*

Petitioner and *amicus* National Association of Stevedores argue that if a shipowner's liability is to be reduced in cases where the stevedore is concurrently at fault, such reduction should be created legislatively, and not judicially. The history of the grant of admiralty jurisdiction, coupled with the nature of the subject matter now in dispute, makes it quite clear that the apportionment issue is ripe for judicial analysis and

[24] If this were not so, Congress would be forced with frequent overhaul of legislation already in effect and otherwise functioning smoothly whenever, through evolution or other means, a new principle of law surfaces which had not been considered by Congress when the statute was enacted, perhaps decades earlier. Federal courts have implicitly recognized this by applying *Reliable Transfer* to actions arising under maritime legislation passed well before the first glimmer of proportionate fault. *See, e.g., Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 44 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (post-amendment case under the Longshoremen's Act); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 982 (5th Cir. 1978) (pre-amendment case under the Longshoremen's Act).

[25] See pp. 19-22, *infra*.

[26] *See, e.g., Harris v. American Investment Co.*, 523 F.2d 220, 224 (8th Cir. 1975) (analyzing common law fraud concepts underlying the Securities Exchange Act); *Tarlton v. Saxbe*, 507 F.2d 1116, 1122-23 (D.C. Cir. 1974) (analyzing common law right to protection of reputation in context of federal statute providing for maintenance by the F.B.I. of criminal records).

decision. This is particularly so where, as here, Congress has invited the courts to shape the new remedy.

The congressional committees charged with drafting the 1972 amendments considered the apportionment issue, but decided to leave it for judicial determination. The debate before the congressional committees did not center on the problem of apportioning liability between shipowners and stevedores in joint fault situations. Indeed, problems far more basic had caused a polarization of views which threatened to preclude the passage of any amendments during that session. As is evident from a review of the committee reports, shipowners, stevedores and longshoremen were most intensely concerned with the amount of benefits, the standard of care owed by shipowners to longshoremen, the availability to shipowners of indemnity from stevedores, and the geographical area in which longshoremen and harbor workers would be covered. So controversial were these issues that all others seemed collateral in comparison.

To avoid deadlock, a meeting stretched on far into the night, attended by representatives of all factions. The 1972 amendments took shape at that time, explaining why the bill as reported out of committee bore such little resemblance to any of the bills under consideration during the hearings. In reaching compromises on the key issues, many other problem areas were left for resolution by other means. Eugene Mittleman, minority counsel to the Senate Subcommittee on Labor, and E. D. Vickery, representing the National Maritime Compensation Committee, both attended the meeting and each has stated that various formulas were considered for apportioning fault between shipowners and stevedores, but that none was adopted. Unable to resolve the

issue in the time available, the parties wisely concluded that the matter should be left for the courts.[27]

Amicus Liberty Mutual makes the rather curious argument that "shipowners took no part in the hearings" (Brief p. 15) so that "their failure to participate in the legislative process, while in no way subject to criticism, does make it impossible for Respondent and its supporting *amici* to track their contentions [respecting the rights and defenses of shipowners] back to the legislature." (Brief p. 16). Mr. Vickery, among others, representing the National Maritime Compensation Committee, was a representative of and spokesman for a number of shipowners including several *amici curiae* supporting Respondent.[28] He expressed the legislative intent quite unequivocally:

> An interesting point is raised by the Committee reports in the following language: ". . . The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." It is apparent from this language that the Congress did not intend for the shipowner to be responsible for more than its proportionate part of a longshore-

[27] *See* Coleman and Daly, *supra* note 23, at 372-73.

[28] A list of the National Maritime Compensation Committee's members appears in Mr. Vickery's testimony before the Senate Subcommittee on Labor. Hearings on S. 2318, S. 525 and S. 1547 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 314 (1972). Three of the seventeen organizations comprising the National Maritime Compensation Committee were Lake Carriers' Association, one of *amici* herein; Mobile Steamship Association, Inc., of which Waterman Steamship Corp., one of *amici*, is a member; New Orleans Steamship Association which includes, among other *amici*, Delta Steamship Lines, Inc., and Lykes Bros. Steamship Co., Inc.; and Steamship Trade Association of Baltimore, Inc., which includes American Export Lines, Inc., and Moore-McCormack Lines, Inc., *amici* herein, together with Farrell Lines, and United States Lines, Inc., members of *amicus* Pacific Merchant Shipping Association, to name only a few of the vessel owners represented at the Committee hearings.

> man's damages in a situation where the accident resulted from the concurrent negligence of the shipowner and the stevedore.

Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act,* 41 Ins. Counsel J. 63, 66 (1974) (*quoting from* H.R. Rep. No. 92-1441, U.S. Code Cong. & Ad. News, 92d Cong., 2d. Sess., 4698, 4704 [1972]).

Mr. Vickery also said:

> Our cherished principal of "equal justice under law" has been virtually an idle dream in the longshoreman — shipowner — stevedore circular liability uses for many years. In this area, the 1972 amendments present to the Federal judiciary a rare and wonderful opportunity, one which is at the express invitation of Congress, to restore to this principle its full meaning as the courts mold the new cause of action for negligence.

Id. at 69.

The door to apportionment of financial responsibility in post-amendment longshore cases is now wide open to the courts. One federal district judge who considered this very point concurred. Although he bowed to the opinion of his chief judge for the District of Oregon in *Hubbard v. Great Pacific Shipping Co., Monrovia,* 404 F. Supp. 1242 (D. Ore. 1975), the distinguished district judge (now Chief Judge) in *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975), stated:

> *Reliable Transfer* overruled a century and a half of judicial precedent. I need not overcome such formidable obstacles. The 1972 amendments expressly authorize comparative negligence. Congress has left the mechanics of its application to the courts, as is customary.

Id. at 1233. Based on this guidance, it is the duty of the courts to accept the congressional directive and face the issues on their merits, as the Fourth Circuit did below.

Judicial determination of the question presented herein is further dictated by the grant of federal maritime power. The Constitution of the United States provides that: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ." U.S. Const. art. III, § 2. In analyzing the constitutional grant, Professor Black stated that

> this language expressly evidences a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry. In this connection it should be noted that the subject matter is the only one specifically singled out for attention in the jurisdiction section — that this clause embodies the only express constitutional attribution of federal judicial power to a named subject matter, except for the general language of the first clause of the section.

Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Colum. L. Rev. 259, 262 (1950).[29]

Apportionment of fault in admiralty has always been evolved through judicial lawmaking. In *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975), this Court

[29] The notion that congressional power extended to the substantive law of admiralty first surfaced in *The Lottawanna,* 88 U.S. (21 Wall.) 558, 577 (1875), and was further discussed in *Butler v. Boston & Savannah S.S. Co.,* 130 U.S. 527, 557 (1889). Until that time, congressional enactments concerning the federal maritime law had relied for their power on the commerce clause. *See The Bright Star,* 4 F. Cas. 139, 142 (No. 1880) (C.C.D. Mo. 1868) (Mr. Justice Miller on circuit). Even in recognizing congressional power to legislate in maritime matters, this Court has viewed the congressional role as supplementary and interstitial. The power is now generally viewed as deriving from the "necessary and proper" clause, U.S. Const. art I, § 8, taken in conjunction with article III's grant. *See The Thomas Barlum,* 293 U.S. 21, 42 (1934); *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 214-15 (1917); D. Robertson, *Admiralty and Federalism* 142-45 (1970). For a general discussion of this area, see Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century,* 67 Harv. L. Rev. 1214 (1954).

departed from the position it had taken in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952),[30] that long-standing judicial precedent is better resolved by the legislature than by the courts and stated its current view respecting the duty of the judiciary, particularly in admiralty matters:

> Finally, the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." . . . No statutory or judicial precept precludes a change in the rule of divided damages, and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by the Congress for personal injury cases.

421 U.S. at 409 (*quoting from Fitzgerald v. United States Lines, Co.*, 374 U.S. 16, 20 (1963)) (footnote omitted). *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (contribution permitted among joint tortfeasors according to fault). As Professor Black has said,

> the relevant constitutional provision recognizes with the clarity of necessary implication that the United States has a deep national concern in the business of navigation and shipping upon the high seas and upon the lakes and rivers of the country, and declares that the concern is to be expressed and made articulate primarily through the judicial branch of the federal government. This national

[30] The deferral language in *Halcyon* was relied upon by the Ninth Circuit in *Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976), and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), and is now being urged by *amicus curiae* National Association of Stevedores herein.

> interest is not in the mere maintenance of a set of technical curiosa pored over in black-letter and chuckled at for their quaintness, but in the control and regulation of a complex of affairs.

Black, *supra* p. 19, at 261. Moreover, apportionment of financial responsibility is in keeping with judicially established principles of fairness. As this Court has said, "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief." *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

The argument is made that "the situation here is unlike that in *Reliable Transfer*, where Congress had failed to accept the opportunity to legislate in the field of collision liability."[31] To the contrary, the situation is identical. Just as Congress failed to enact specific legislation in the field of collision liability, thus prompting this Court to step in in *Reliable Transfer*, Congress similarly chose not to legislate specifically on the handling of waterfront accidents caused by the concurring fault of a vessel owner and stevedore despite extensive hearings preceding the 1972 amendments. The Court must take the same steps here, in accordance with its constitutional responsibility, in order to correct the obvious inequity which would exist if a party only slightly at fault for an accident were asked to bear the full financial burdens of the loss.[32]

[31] Brief of Liberty Mutual Ins. Co. at 31.

[32] The Court has been faced with this same problem in the past and, despite the existence of the Longshoremen's Act, on at least two occasions has reached decisions that were not expressly permitted by the Act. To the contrary, critics of each decision argued that the decisions directly contravened it. *See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133 (1956) (creation of "warranty of workmanlike service," a breach of which would require the stevedore to indemnify the shipowner despite exclusivity language in the Longshoremen's Act); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962) (extension of coverage under the Longshoremen's Act into the "twilight zone" between federal

It has been suggested that since Congress failed to discuss specifically the apportionment question, it must have decided to leave the state of the law unchanged and therefore the courts should not impose their own views. This argument is also unpersuasive. This Court has not shown any reluctance to decide cases in areas which might be considered statutory gaps.[33] Prior to *Reliable Transfer,* for example, the United States had long adhered to a rule dating from *The Schooner Catherine v. Dickinson,* 58 U.S. (17 How.) 170 (1855), requiring an equal division of damages between two colliding vessels, each of which was to some degree at fault. By 1975, however, the United States was virtually alone in this position, Congress having failed to adopt the Brussels Collision Convention of 1910 which called for apportionment of damages according to fault. In *Reliable Transfer,* the divided damages rule was at last put to rest by the Court despite the failure of Congress, over a period of 65 years, to obtain the same result legislatively.

Finally, the National Association of Stevedores argues that since Congress has been conducting oversight hearings for two years, there is even greater reason to await further Congressional action. A review of that portion of the hearings published to date, however, reveals that stevedores are complaining about

and state jurisdiction despite language in the Longshoremen's Act limiting coverage to areas not covered by state law, 33 U.S.C. § 903(a) (1976); *Czaplicki v. The SS Hoegh Silvercloud,* 351 U.S. 525 (1956) (injured longshoreman permitted to maintain third-party action despite statutory assignment to his employer). The critical factor in these cases is not whether they were correctly decided, but that they were decided by the Court on their merits.

[33] *See Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970) (judicial creation of remedy under the general maritime law for wrongful death in territorial waters despite the failure of Congress to include such a remedy in the Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq.* (1976)).

their compensation exposure rather than third-party problems.[34]

B. *Joint and Several Liability Has No Application to This Case.*

The notion that the opinion below abrogated the maritime and common law doctrine of joint and several liability was first asserted by *amicus* Liberty Mutual Insurance Company on its fledgling flight into this protracted litigation in its Brief in Support of the Writ of Certiorari (pp. 9-10). It had not heretofore been raised by the parties themselves nor by *amici curiae* in their support at any previous stage of the proceedings. The argument now advanced warrants discussion as *amicus* Liberty Mutual, at least, appears to place its greatest reliance upon it.

As applied to the instant litigation the argument is certainly unique, but will not withstand scrutiny. Liberty Mutual itself recognizes the basic distinction between the usual situation and the one existing here:

[34] Part I of the Oversight Hearings (1977) contains 953 pages, of which 377 (39.6%) are devoted to stevedoring interests, 199 (20.9%) to builders of small boats and marine operators, 151 (15.8%) to insurance interests, 87 (9.1%) to shipbuilders, 72 (7.6%) to regulatory interests, 32 (3.4%) to longshoremen, 21 (2.2%) to fishermen, and seven each (0.7%) to hospitals and general comments. Third-party actions are virtually ignored. The reason stevedores did not address the subject is evident from the comments of Donald B. Robertson, Vice-President of California-based Metropolitan Stevedoring Company:

> Prior to November 26, 1972, we were picking up about 90 percent of the costs of third-party cases filed against the vessel. At that time, we had indemnity over problems. We have escaped this liability, at least for now.

Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act (Part I) before the Subcomm. on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. at 752 (1977).

> In the instant case the question, more precisely, is one of "several" liability for, since the employer has a statutory immunity from tort liability to the employee, he is not a "tortfeasor", nor is his liability "joint". (Citing authority).

Brief of Liberty Mutual Ins. Co. at 3. What Liberty Mutual fails to appreciate is that the Longshoremen's Act precludes any application of its "joint and several" argument to the facts of this case. This was carefully explained by Judge Friendly in *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978). The basic proposition was set forth as follows:

> When two or more persons' torts together cause injury, each is fully liable to the victim.

Id. at 718. Judge Friendly then noted the precise exception to the general rule which prevails here:

> Workmen's compensation statutes like the LHWCA added an important new element to the problem because of their exclusive liability sections, as exemplified by 33 U.S.C. § 905(a).

Id. at 719. Thereafter, several cases were cited, all of which demonstrated that either on a "linguistic analysis" or on the statute's elimination of the employer's tort liability to the victim, it was thus "impossible for him to be jointly liable with any other party." *Id.*

Liberty Mutual argues that although the word "joint" is inapplicable, the vessel is nonetheless "severally" liable. In so doing, it begs the question. By both legal and ordinary dictionary definitions "joint" and "several" presuppose the existence of two or more parties. Here we are left with the proposition that when two parties are concurrently at fault for an accident, one of whom has statutory immunity from tort liability and cannot within the meaning of "joint and several" be considered a joint or any other kind of tortfeasor, the other party, standing as the only tortfeasor against

whom a judgment for damages may be obtained, suddenly becomes "severally" liable. Severally with whom?

The traditional doctrine of joint and several liability operates to permit a plaintiff who has been injured by two or more tortfeasors to recover his entire damages from any one of them. Plaintiff may elect to proceed against one joint tortfeasor individually or may join all those responsible for his injuries in a single action. Subject to the limitation that plaintiff is entitled to but one full recovery, he may choose to proceed against each joint tortfeasor *seriatim* until he has been made whole. This was born of a natural solicitude for the victim by the courts which did not want to see him go penniless.[35] The doctrine of joint and several liability served primarily to protect plaintiffs from defendants unable to pay judgments entered against them. The Longshoremen's Act, however provides safeguards to ensure the payment of compensation benefits. 33 U.S.C. § 932 (1976). Thus, there is no need to protect longshoremen from impecunious stevedores.

[35] The collision cases relied upon by Liberty Mutual hardly advance its argument. *The Washington and The Gregory*, 76 U.S. (9 Wall.) 513 (1870), *The Alabama and the Gamecock*, 92 U.S. 695 (1876), and *Phoenix Ins. Co. v. The Atlas*, 93 U.S. 302 (1876), all affirm the longstanding rule of division of damages caused to an innocent party between two vessels found to be at fault. This rule, originally requiring damages to be equally divided (the "moiety" rule), was modified by this Court in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), to require that damages be divided according to each vessel's proportionate degree of fault. Where the moiety rule was applied, the right of an innocent party to collect his entire damages from one of several vessels found to be at fault was contingent on the remaining vessel's inability to bear her proportionate share of the damages.

In cargo cases, such as *The Chattahoochee*, 173 U.S. 540 (1899), and *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), where the carrying vessel was immune from direct liability by reason of the Harter Act, the non-carrying vessel was able to recoup a portion of amounts paid to cargo from the carrying vessel through division of overall damages.

Despite the contention that the Court below "indicated ignorance"[36] of the applicability of joint and several liability in a maritime context, the opinion of Judge Haynsworth amply demonstrates the error of such a suggestion. The Fourth Circuit understood, considered and rejected any idea of "several" liability for all of Petitioner's damages and noted that where a single joint tortfeasor has been compelled to pay a plaintiff's entire judgment he has, under the law of most jurisdictions, a concomitant right to indemnity and/or contribution — a right that has been abrogated by the 1972 Amendments.

> The longshoreman, looking to the many references in the statute and its legislative history to the principles of land based negligence law, would import into those references those principles of the common law which permit full recovery by an injured plaintiff against any single joint tortfeasor, but that common law doctrine is mitigated in many states by the provision of rights of contribution or of indemnity from other joint tortfeasors, or has been supplanted by a system of comparative negligence. In the 1972 amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore, and it is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedore very greatly so.

577 F.2d at 1155, Petitioner's Appendix at A56-57. Full recovery by Petitioner Edmonds against the lone tortfeasor, the vessel owner, was rejected because its application is wholly inconsistent with the language and purpose of the Longshoremen's Act and inequitable in its result. The rejection of the argument had nothing whatever to do with concepts of joint and several

[36] Brief of Liberty Mutual Ins. Co. at 5.

liability, common law or otherwise. The decision was based on a sensible reading of Section 905(b) of the Longshoremen's Act and this Court's views on fair apportionment of responsibility for accidents in accordance with fault as typified by *Cooper Stevedoring* and *Reliable Transfer.*

C. *Adoption of an Equitable Credit Will Not Give Rise to "Tripartite Litigation."*

Petitioner and his supporting *amici* argue that the decision below requires "circuitous third party suits,"[37] "dissipates stevedore resources,"[38] and puts the stevedore "right back where he was prior to 1972."[39] Such assertions ignore the proof required for an injured longshoreman to recover damages in a third-party suit. Even in circuits where credit defenses have been rejected, longshore plaintiffs must prove that the negligence of a third party proximately caused their injuries. Where actions or omissions of both shipowner and stevedore conceivably contributed in causing an accident, shipowners will inevitably defend by claiming that the plaintiff's injuries were caused solely by the negligence of his stevedoring employer. Since that theory, if adopted by the trier of fact, would preclude any recovery by the plaintiff, he must inevitably argue that the ship's negligence, and not the stevedore's, caused his injuries. In so doing, the plaintiff will introduce that evidence tending to cast liability on the shipowner and exculpate the stevedore through use of the stevedore's employees as witnesses. Dual representation of the stevedore is unnecessary.[40]

[37] Brief of Petitioner at 42.

[38] *Id.* at 45.

[39] *Id.*

[40] Indeed, compensation carriers (or self-insured stevedores) have always been free to informally monitor third

Amicus Liberty Mutual Insurance Company observes (brief p. 29) that in Baltimore and Norfolk attorneys for shipowners have been filing motions requiring the joinder of employers and their insurance carriers at the inception of litigation. In Baltimore, by strange coincidence, counsel for the employers on the one hand, and the vessel owners on the other, are identical to counsel here for *amici* Liberty Mutual Insurance Company and American Export Lines, *et al.*, in a total of six consolidated cases.[41] While it is true that the motion to join the employer was granted in one such case by the Honorable Alexander Harvey, II,[42] the matter of how to handle the problem is now being fully reconsidered in the District of Maryland, the cases having been referred to the Honorable Joseph H. Young for decision. There is no finality to the problem as this brief is written. Of course, the motions were made pursuant to the suggestion of the court below in this case.[43]

party actions and provide assistance to the plaintiff's attorney in the form of documentation and favorable witnesses. Should a carrier determine that the plaintiff's lawyer was not handling the litigation properly, thereby threatening the recoupment of its lien, the carrier could intervene as an interested party under Fed. R. Civ. P. 24. The paucity of cases in which such joinder appears suggests that stevedores and their carriers are quite satisfied with representation of their interests by plaintiffs' counsel. Certainly, until this stage of the litigation, Liberty Mutual was satisfied with its representation because it declined to participate. See note 14 and accompanying text, *supra*.

[41] White v. Moore-McCormack Lines, Inc. (Civil No. Y-78-553); Bledsoe v. Scheepvaart Maats-Trans-Ocean B.V. (Civil No. K-78-552); Olczak v. Dinaco Compania De Navegacion, S.A. (Civil No. M-78-554); Fernandez v. Scheepvaart Maats-Trans-Ocean B.V. (Civil No. B-78-555); Fernandez v. Moore-McCormack Lines, Inc. (Civil No. H-78-556); and Wetters v. Moore-McCormack Lines, Inc. (Civil No. H-77-858).

[42] Wetters v. Moore-McCormack Lines, Inc. (Civil No. H-77-858).

[43] In future cases, the stevedore might be made a party plaintiff so the rights of all parties may be adjudicated in one proceeding.
577 F.2d at 1156, Petitioner's Appendix at A61.

The interesting aspect of the Baltimore cases, at least so far as this proceeding is concerned, is that counsel are in essential agreement that there is no need for active participation by stevedores necessitating the expense of litigation. The court below was concerned that stevedores be given actual notice of litigation in which they have a direct financial interest. In Baltimore, at least, it has been the long-standing practice for employers or their carriers to be named as "use plaintiffs" in order to protect their liens and this was so long before the 1972 amendments with no active participation whatever by the use plaintiffs in the ensuing litigation.[44] At least one salutary reason for the practice of actually naming the real party in interest as a use-plaintiff is to prevent such party from alleging at the conclusion of litigation that a finding of fault on its part should not be binding either because of a lack of notice or of the right to participate. This latter right, of course, is always available by intervention though rarely necessary or utilized.

Our own preference would be to adopt the suggestion of Judge Skopil in *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975):

> If my proposal is to become law, it must afford the stevedore due process. Future cases will have to define the substance and procedure of this protection. Fed. R. Civ. P. 24 provides the stevedore with means of intervening to protect his interest if he so desires. It would seem that the Court should assume responsibility for guaranteeing that he receives notice. The Court could require the defendant shipowner to provide such notice when he pleads the comparative negligence of the plaintiff. Alternatively, the Court could provide notice on its own initiative through the Clerk's

[44] *Poleski* v. *Moore-McCormack Lines*, 21 F.R.D. 579 (D. Md. 1958). As a use-plaintiff, the stevedore could be treated as a non-party for discovery purposes Cf. *Jones v. Rederai A/B Soya*, 31 F.R.D. 524 (D. Md. 1962).

> office. Neither step may be constitutionally required, by it is favored by interests of fairness and expediency.

398 F. Supp. at 1234.[45]

We do not consider that there is any reasonable justification for the argument that application of an Equitable Credit will promote tripartite litigation. But even if there were, this Court has already expressed its dissatisfaction with continuing an unjust rule merely to relieve court congestion:

> Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

United States v. Reliable Transfer Co., 421 U.S. at 408. Mr. Justice Stewart's observation respecting the unfairness of the moiety rule in collision cases is even more pertinent here, where Petitioner and his supporting *amici* all argue that *any* ship's negligence will result in the vessel being held liable for *all* the plaintiff's damages.

D. *Application of an Equitable Credit Does Not Impose Unjustified Financial Burdens on Injured Longshoremen or Their Employers.*

Petitioner and all *amici curiae* supporting him claim that the decision below subjects them to substantial and unjustified economic hardship. Their arguments, however, fail to come to grips with the dollars and cents involved and, particularly, the gross inequity of requiring a partially negligent third party to pay 100% of the damages.

[45] A more complete discussion of the erroneous assertion that the application of an Equitable Credit will promote tripartite litigation is contained in the brief of *amicus curiae* Pacific Merchant Shipping Association beginning at heading III B.

1. The Injured Worker.

The Ninth Circuit cited the unfairness to an injured longshoreman of reducing his third-party damages on account of his employer's negligence as one of its principal reasons for reversing the district court in *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 680 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). Similarly, the Fifth Circuit in *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), believed there was an unjustified burden on the injured longshoreman relying, primarily, on the earlier Ninth Circuit cases of *Shellman* and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Neither court understood or analyzed the application of an Equitable Credit. All that was done was to compare the dollar amount of damages suffered by the worker with the payment required to be made by the vessel owner. Upon noting that the sum received from the vessel owner was less than the damage figure, erroneous and inequitable conclusions were reached.

An analysis of *Frasca v. Prudential-Grace Lines*, 1975 A.M.C. 1130, 1143 (D. Md. 1975), in which the Equitable Credit was given its name and first applied, serves well to illustrate how longshoremen allegedly suffer by the application of a credit and to expose the fallacy of that reasoning. The circumstances were these, pursuant to specific jury findings:

Total damages	$21,000.00
Frasca's fault	10%
Stevedore fault	50%
Vessel fault	40%

The compensation lien was $5,438.30. Applying the Equitable Credit, judgment was rendered against the vessel owner for 40% of $21,000.00 or $8,400.00. Since the employer's 50% fault for the injury deprived Frasca

of damages he otherwise would have received in the sum of $10,500.00 (one-half of $21,000.00), and since that sum exceeded the amount paid by the employer in compensation, Frasca was not required to repay the lien out of the damage award against the vessel owner. His net recovery, therefore, amounted to $13,838.30.[46]

If the Equitable Credit had not been applied, the damage award would have been reduced 10% by reason of Frasca's contributory fault to $18,900.00. Frasca's net recovery would thus have been $5,071.70 greater than his recovery with the Equitable Credit (the difference between $18,900.00 and $13,838.30). Critics of the credit thus point to *Frasca* as a typical case in which the application of an Equitable Credit worked to the financial disadvantage of the injured worker. However, the criticism proved premature, as it often will with the possibility of continuing compensation payments.

That portion of the original decision in *Frasca* granting an Equitable Credit was later rendered moot by a judgment n.o.v. for the shipowner. 394 F. Supp. 1092 (D. Md. 1975). After the lower court decision, however, Frasca returned to the Deputy Commissioner for additional compensation, and was awarded permanent partial disability of $9,571.02,[47] making the amount of compensation ultimately paid $15,009.32 ($5,438.30 + $9,571.02). Under the Equitable Credit or any other apportionment formula, the stevedore's liability for compensation benefits should not depend on the purely procedural question of whether or not the injured worker sought a compensation award for permanent disability *before* pursuing his third-party action. Thus, the stevedore's ultimate compensation exposure in *Frasca* of $15,009.32, and not the $5,438.30 listed as the compensation lien at the time of trial, represents the

[46] This resulted from the court's application of Principle [4] of the formulation set forth, *supra* p. 11.

[47] Letter to counsel for *amici curiae* from Frasca's attorney dated July 14, 1976.

stevedore's potential payments under an Equitable Credit. Had an Equitable Credit been granted, because the negligence of his employer had reduced his recovery by an amount ($10,500) in excess of his compensation payments ($5,438.30), Frasca could have gone back for additional compensation. Every dollar of compensation received up to $10,500 could be retained, since that was the amount by which the stevedore's negligence would have reduced Frasca's recovery.[48] Since over $10,500 in compensation was owed, application of an Equitable Credit *would not have reduced Frasca's total recovery from all sources by as much as a penny.* It would, however, have lowered his employer's compensation exposure to $10,500 from the $15,009.32 actually paid.[49]

In its initial opinion below, the Fourth Circuit rejected the argument that a credit imposed an unjustified burden on injured longshoremen:

> They have no inherent right to recover from a vessel damages caused by the negligence of a stevedore. To the extent the longshoreman receives a somewhat lesser amount than he otherwise would have, his complaint lies not with the result

[48] In all cases involving application of an Equitable Credit, the stevedore's liability for payment of workmen's compensation equals either its full statutory liability or that amount by which its negligence has reduced its injured employee's third-party recovery, whichever is lesser. The exact application of this rule, however, will vary from case to case depending upon the facts presented. Thus, development of this aspect of the Equitable Credit might best be left to the district courts so that the varying factual situations might be taken into account and stevedoring interests will have every opportunity for full representation.

The suggested rule is explained in greater detail in the appendix hereto at pp. 6a-7a.

[49] It is evident from a similar review of the underlying facts in *Shellman* that the Ninth Circuit failed to do its homework in that case. *Shellman* is analyzed in detail in the appendix hereto at pp. 4a-5a.

> reached in this case, but more basically with the compensation scheme of the Act that prevents him from recovering damages from his employer, for a concomitant of the stevedore's no-fault liability is the exclusivity of the compensation remedy against it. Thus, even as the longshoreman receives a lesser recovery, he benefits from one of the Act's many trade-offs; he becomes entitled to statutory benefits without having to prove fault on the part of anyone. As will be later apparent, he also benefits from the negligence of the vessel, but only to the extent of its own fault.

558 F.2d 186 at 192, Petitioner's Appendix at A37.

Application of the Equitable Credit calls for no change whatever in the traditional sharing of fault in maritime cases: an injured seaman or longshoreman, in maritime causes of action, must suffer the consequences of his own contributory fault by a reduction of his otherwise recoverable damages in direct proportion to his degree of fault. An Equitable Credit carries this sensible sharing of proportionate fault to its logical conclusion. It includes the shipowner and stevedore as well, in conformity with the legislative intent of the 1972 amendments.

The only law review commentary to date analyzing the opinion below agreed that the Equitable Credit

> [R]epresents the fairest solution for the parties, while still fully consistent with the words of the amendments and the intent of Congress in enacting them.

Note, *Apportionment of Damages Under 1972 Amendments to Longshoremen's and Harbor Workers' Act,* 52 Tul. L.R. 602, 609 (1978), on panel decision.

2. The Employer

In its initial opinion, the Fourth Circuit stated: "If we were left purely to our own devices, an attractive holding might be to bar the stevedore from asserting an equitable lien if it were negligent . . . ." 558 F.2d at 192,

Petitioner's Appendix at A40. While the panel felt it was compelled to ensure full lien repayment under the principle first announced in *The Etna,* 138 F.2d 37 (3d Cir. 1943), the court *en banc* retreated from such a view, leaving the question of lien recoupment undecided. Automatic lien recoupment in the face of stevedore negligence is repugnant to the equitable concept of subrogation.[50] It does not follow from a reading of *The Etna* that the stevedore must be repaid its compensation lien.

Pursuant to *The Etna* and its progeny, stevedores are now said to possess a common law right of equitable subrogation in any funds generated by the employee's suit against the shipowner. Section 162 of the *Restatement of Restitution* states that where one person discharges the obligation "owed by another" he is entitled to be subrogated to the position of that person against the one causing the damage. However, the payment of compensation by an employer does not discharge the obligation of a negligent third party to respond in damages. Rather, the stevedore's duty to pay compensation is based on wholly different concepts. Furthermore, the stevedore's right to reimbursement of its compensation payments out of any recovery from a third party, whether obtained by statute or by the doctrine of equitable subrogation, existed in order to prevent the unjust enrichment which would accrue to a longshoreman if he were allowed to recover doubly for his injuries.[51]

[50] *See* Restatement of Restitution § 162 (1937).

[51] This has recently been noted by one court:

> The statutory and jurisprudential right of subrogation, created for the benefit of the employer [stevedore] who has made compensation and medical payments to his employee [longshoreman], exists to prevent double recovery by the employee.

Davillier v. Cavn Venezuelan Line, 407 F. Supp. 1234, 1237 (E.D. La. 1976).

Both the National Association of Stevedores and Liberty Mutual Insurance Company argue that if the stevedore were not permitted to recover *all* of its compensation payments, a distinct hardship would be worked upon the stevedore and its compensation carrier. Generally, they argue that application of an Equitable Credit demonstrates ignorance of the cost of waterfront safety to employers and their carriers who must pay the substantially increased benefits accorded by the amended Longshoremen's Act. They also argue that these financial burdens were infinitely greater than anticipated because the coverage of the Act extended much farther ashore than was contemplated by employers and their carriers at the time of the passage of the 1972 Amendments. Finally, they urge that the entire purpose of the amendments was to limit the liability of stevedores strictly to the payment of compensation benefits so that the resources of stevedores and their carriers could be husbanded in order to pay the increased benefits.[52]

Vessel owners were not involved in the litigation[53] which resulted in geographical extension of the Act beyond the limits stevedores contemplated when the 1972 amendments were enacted. The sole position of

[52] Brief of *amicus* Liberty Mutual Insurance Company, pp. 29-31; brief of *amicus* National Association of Stevedores, pp. 7, 9, 17-22; brief of Petitioner at p. 17. It was further argued by *amicus* Association of Trial Lawyers of America that inasmuch as § 905(a) proscribes the defenses of negligence of a fellow servant, assumption of risk and contributory negligence, there is no justification for limiting the vessel to its percentage of fault for an accident. Section 905(a), however, has absolutely no application to suits against third parties. It relates solely to an action by an injured worker against his employer if the employer fails to pay compensation benefits and, in such suit, the *employer* is not permitted to raise the defense of negligence of a fellow servant, assumption of risk or the contributory negligence of the employee.

[53] *Northeast Terminal Co. v. Caputo,* 432 U.S. 249 (1977).

Respondent and *amici curiae* herein is that shipowners should not be called upon to pay unanticipated expenses of stevedores which are totally unrelated to the issues of this litigation.

Stevedores have, however, been allowed to husband their resources in order to pay increased compensation benefits.[54] This was accomplished by eliminating *Ryan* indemnity as it previously existed. It did not, however, create a reverse-*Ryan* indemnity situation so that substantially negligent stevedores could be made whole by minimally negligent vessel owners or, for that matter, so that stevedores who were in any way negligent could totally escape all financial responsibility for their fault. All that the Equitable Credit requires is that stevedores or their carriers pay their fair share of the financial burden not to exceed, however, the upper limits of their compensation exposure.

While unjust enrichment to or double recovery by an injured longshoreman is admittedly improper, there is another side to the coin. If it is wrong for the injured worker to be unjustly enriched, it is even more unjust for a negligent employer to profit by his own wrong and obtain a windfall recovery. In urging that the increased benefits paid under the 1972 amendments have resulted in enormous expenses to stevedoring employers and their compensation carriers, the fact that the ultimate burden is shouldered by the vessel owner is ignored. Stevedoring charges are paid by the shipowner. These are calculated to recoup all expenses of the stevedore and provide an additional profit. Thus, since premiums for workmen's compensation insurance are one of the costs of a stevedoring operation, the cost of premiums, which reflect the vastly increased benefits to which

[54] It is contended that this was one of the primary purposes of the 1972 amendments. Brief of National Association of Stevedores, p. 18.

waterfront workers are now entitled when they sustain personal injuries, are paid initially by shipowners as a part of the rates for stevedoring services.

This passing along of the expense to the vessel owner was discussed prior to the passage of the 1972 amendments as well as at the oversight hearings subsequent to the amendments.[55] It is obviously inappropriate to permit the employer to effect a double recovery when its fault was a contributing cause of the accident, merely because *some* fault by the vessel owner

[55] Francis A. Scanlan, testifying on the proposed 1972 amendments before the Senate Subcommittee on Labor on behalf of the National Maritime Compensation Committee, discussed the realities of compensation premiums:

> Now, this was the single most expensive item of doing business, outside of direct labor costs. And it is a tremendous cost which must be included in the stevedore's rates that are paid by the shipowners; because ultimately, the shipowner in this case must pay the bill; and he in turn, of course, will pass it on to the shippers and consignees, who use his services.

Hearings on S. 2318, S. 525 and S. 1547 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 261 (1972).

At the oversight hearings, Albert P. Kelley, Jr., Treasurer of John T. Clark & Son, a stevedore employer, testified:

> The ships are bearing sufficient burden of costs when we have to pass on our insurance rates.

Oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act (Part 1) before the Subcomm. on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) at p. 441. Julius Stern, a retired member of the International Longshoremen's and Warehousemen's Union testified that: "The stevedoring company contracts labor. No matter what the insurance costs are it is paid by the people that own the ships." *Id.* at 143. Similarly, H. Terrence Keenan, Insurance Manager for Strachan Shipping Company (a stevedore) stated that: "Our charges to our principals, our customers, are based on a cost of doing business." *Id.* at 353.

likewise contributed to the accident.[56] The handling of the stevedore's lien according to the mechanics of an Equitable Credit as suggested herein results in the sensible sharing of the financial burdens of an industrial waterfront injury-producing accident amongst the parties at fault. Such an approach meets the formula recently established by this Court in *Reliable Transfer* and *Cooper Stevedoring*, and comports with the reasoning of Judge Skopil in *Croshaw:*

> The stevedore's right to reimbursement, being equitable in nature, is subject to equitable regulation. . . . There is no equity in the principle that a

[56] This fact was recognized recently by the Ninth Circuit in *Olivas v. United States*, 506 F.2d 1158 (9th Cir. 1974). There the government contracted with a private company to do certain work for the Air Force. Olivas, one of the contractor's employees, was injured on the job. He collected workmen's compensation and then initiated an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1970). The government sought a set-off for compensation benefits paid by the employer's insurance carrier, and the carrier resisted. After analyzing the insurance contract, the court concluded that in effect "the government paid the insurance premiums and should get the credit for the payments made under the policy." 506 F.2d at 1163.

If the Fourth Circuit is reversed, the shipowner will, in effect, be required to repay the carrier's entire lien. This is a windfall double recovery for the insurance company. It obtains premiums and then recoups from the very shipowner who has paid the premium. This anomaly is further heightened by the shipowner's payment of damages to Edmonds. The third-party award was based in large part on Edmonds' claim for lost wages, both past and future. The major goal of workmen's compensation, however, is income replacement. Thus, absent a credit, the vessel owner in this case would effectively pay for Edmonds' lost wages *three times:* (1) through the increased premiums passed along to it in the stevedoring contract; (2) repayment of the stevedore's full lien; and (3) payment of damages to the longshoreman. *Amici curiae* know of no legal principle which countenances such a result.

> stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence. If this lien is to be truly equitable, it must be diminished according to that negligence.

Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224, 1234 (D. Ore. 1975).

V.

PERMITTING NEGLIGENT STEVEDORES TO RECOVER THEIR ENTIRE COMPENSATION LIENS FROM THIRD-PARTY JUDGMENTS WOULD DEFEAT TWO MAJOR LEGISLATIVE GOALS OF THE 1972 AMENDMENTS.

Unless the stevedore bears some portion of the financial risk when it is concurrently at fault with the vessel owner for an injury-producing maritime tort, two aspects of the legislative intent which brought about the 1972 amendments to the Act are likely to be defeated: first, stevedores' incentive to enforce safety standards rigorously; second, the desire to reduce personal injury litigation and to avoid further straining of already crowded court dockets.

A. *Negligent Stevedores Entitled To Full Lien Recovery Would Have Diminished Incentive To Maintain Effective Safety Programs.*

Despite the elimination of vessel liability for maritime injuries produced by unseaworthy conditions, Congress fully intended that shipowners bear financial responsibility for injuries caused by negligence — a concrete incentive to vessel owners to do all in their power to promote safety programs which would sharply reduce the alarmingly high rate of accidents to maritime workers. Congress was quite specific in emphasizing this vitally important goal:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

House Report, *supra* p. 18, at 4704.

It was not, however, the Congressional intent to permit the stevedore to go scot free when its own fault contributed to an injury-producing accident. To the contrary, Congress was just as specific in delineating the concomitant duty of the stevedore to promote safety, an empty requirement if the stevedore is permitted to recover its entire lien merely because *some* fault by the vessel contributed to the accident.

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by *assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.*

Id. at 4699 (emphasis added). The stevedore's incentive is lost, and the intent of Congress clearly thwarted, if the stevedore is permitted to recover all of the "adequate workmen's compensation benefits" the amended Act requires it to pay by the mere showing of some slight fault on the part of the vessel.

B. *Full Lien Repayment Would Discourage Stevedores From Partial Waivers To Effect Settlements And Would Prompt A Proliferation Of Litigation.*

Though not expressly stated, an implicit and clearly understood legislative intent when the 1972 amendments were enacted was the reduction of third-party litigation and the crowding of court dockets with such litigation.

> The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

Id. at 4702-03.

Typically, a potential third-party suit is one in which a reasonable plaintiff's attorney sees a possible recovery in excess of compensation benefits already paid to his client by the stevedore based on some negligence on the part of the vessel. Of course, if there were no ship negligence, there would be no basis for a third-party claim. Just as often, however, in fact more often than not, stevedore fault also contributed to the accident. Therein is the setting which brings about the difficulty in disposing of third-party claims unless each of the parties involved shares equitably in the financial burdens of potential third-party claims: the injured worker for his contributory fault, the shipowner for its negligence and the stevedore for its concurring fault.

In those instances in which there is apparent substantial fault on the part of the stevedore, and the vessel owner sees that it might escape with a finding of no fault on its part, the case will inevitably be tried unless the stevedore is willing to waive a portion of its lien or, in certain circumstances, pay a given sum in excess of its current lien to settle future compensation exposure in the event of a verdict in the vessel's favor. Such an impasse can be avoided only if courts require stevedores to assume a portion of the financial burden in recognition of their portion of the fault which contributed to the accident.

The Fourth Circuit recognized the fallibility of the argument that a partially negligent vessel owner be required to pay 100% damages. Only one further step is needed to bring about the result which will fully implement the two-fold legislative intent that vessels not be required to pay for stevedore fault and that *all* parties bear a portion of the financial burdens which accompany most third-party claims. The method, or mechanics, of such sharing is set forth elsewhere in this brief, with our suggestion that the actual application of the Equitable Credit be left to the trial courts because of differing factual situations from case to case. The desirability of such sharing, from the viewpoint of both equity and ease of out-of-court settlements, was well expressed in the majority opinion of the Third Circuit in *Marant v. Farrell Lines,* 550 F.2d 142 (3d Cir. 1977), relying on Mr. Justice Stewart's observation in *Reliable Transfer*:

> The concurring opinion expresses concern that any credit or apportionment rule would lead to increased litigation and that, even "if" the present rule is unfair, change should come from Congress. This court being already inundated with LHWCA litigation to interpret the 1972 amendments, it is difficult — though concededly frightening — to imagine an increase. It would seem as likely, however, that a rule which equitably apportioned liability according to fault might decrease litigation and promote settlement, especially by removing the incentive of a large judgment against a shipowner who is only partly at fault. As the Supreme Court has recently observed: "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements.

550 F.2d at 147 (*quoting from United States v. Reliable Transfer Co.,* 421 U.S. at 408.)

CONCLUSION

It is difficult to justify a system of awarding damages which permits the following anomalous results: if a man is injured through no fault of the vessel owner and 100% fault of the stevedore, or less if combined with the worker's own fault, the stevedore pays full compensation with no right of repayment. But if there is any fault by the vessel (as little as 30%, 20%, 10% or even 1% with corresponding stevedore fault of 70%, 80%, 90% or even 99%)[57] the grossly negligent stevedore recovers its entire lien and the vessel pays 100% damages. Such a system *always* works to the financial advantage of the stevedore; *always* to the disadvantage of the vessel owner; and the injured workman is the only one of the three parties involved who is *always* required to bear the financial burden of his own proportional contributory fault. Dean Prosser, in discussing the analogous topic of contribution, criticized this all-or-nothing approach:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, . . . while the [other] goes scot free.

[57] The example is not far-fetched. On January 19, 1979, in *Anthony Trevellick v. Flota Mercante Grancolombiana, S.A.* Civil No. C-77-1604-WHO (N.D. Calif.), a district court jury apportioned fault and found damages in a maritime personal injury case as follows:

Plaintiff's fault	—	70%
Stevedore's fault	—	29%
Vessel's fault	—	1%
Total Damages		—$167,000

Judge Orrick had not entered judgment at the time this brief was prepared. Presumably, he will follow the Ninth Circuit cases of *Shellman* and *Dodge* which will mean that the 1% negligent shipowner pays the plaintiff's full damages of $50,100 (a 70% reduction because of his contributory negligence) and the 29% negligent stevedore will recover its entire compensation lien which we are advised amounts to approximately $29,000.

W. Prosser, *The Law of Torts* § 50, at 307 (4th ed. 1971). If such a result is to be countenanced, it strongly suggests that Mr. Bumble's comment had great merit.[58]

Traditional arguments based on history and *stare decisis* can be made by foes of the Equitable Credit. If they were made to the Ninth Circuit in *Shellman* and *Dodge,* or to the Fifth Circuit in *Samuels,* there is no evidence of them in the opinions. Such arguments were, however, made to the Supreme Court in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975). They were met head on. Since those arguments were "illogical", "arbitrary" and basically "unfair", 421 U.S. at 404, this Court overturned many years of contrary precedent and reached the sensible results those decisions demonstrate. In doing so, Mr. Justice Stewart stated in *Reliable Transfer* that:

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in *The Schooner Catherine* — the "just and equitable" allocation of damages. *And worldwide experience has taught that that goal can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible.*

421 U.S. at 410-11 (Emphasis supplied.)

This Court has long demonstrated its willingness to take the lead in hard cases, especially in the field of

[58] "If the law supposes that," said Mr. Bumble . . . "the law is a ass, a idiot." Charles Dickens, *Oliver Twist,* Chapter 51.

maritime law. *Amici curiae* urge the Court to do so once again so that the goals of the 1972 amendments can be carried out in accordance with the legislative intent and recent decisions affecting loss distribution in maritime cases.

For all the foregoing reasons, the judgment below should be affirmed and this Court should instruct future courts handling longshoring personal injury litigation to apply an Equitable Credit which will fairly and equitably apportion loss in accordance with fault.

Respectfully submitted,

WARREN B. DALY, JR.,
OBER, GRIMES & SHRIVER,
Of Counsel
January 31, 1979

RANDALL C. COLEMAN,
1600 Maryland Nat. Bank Bldg.,
Baltimore, Maryland 21202,
Attorney for *Amici Curiae*,
American Export
Lines, Inc.

APPENDIX

MECHANICS OF THE EQUITABLE CREDIT

Application of the Equitable Credit in cases where the compensation lien exceeds the damages attributable to the fault of the stevedore is demonstrated by the following situation:

Vessel's fault	60%
Stevedore's fault	30%
Longshoreman's fault	10%
Damages	$10,000
Compensation lien	$4,000

The longshoreman will be entitled to a recovery of $6,000 against the vessel (sixty percent of $10,000). Because the fault of the stevedore reduced the longshoreman's recovery by $3,000 (thirty percent of $10,000), the injured worker would only be required to repay $1,000 ($4,000 [amount of lien] minus $3,000 [reduction in recovery due to stevedore's fault]) of the workman's compensation payments previously received. The longshoreman's total recovery is therefore $9,000: $4,000 previously received in workmen's compensation benefits plus $5,000 remaining from his judgment against the shipowner after the repayment of $1,000 to his employer. Because $9,000 was all he would have been entitled to in any event, he cannot be heard to complain of any injustice. The stevedore was statutorily protected from payment of an amount greater than its responsibility under the compensation act. However, due to a sharing of fault with the shipowner, the stevedore has escaped with less than its full compensation liability. Thus, the fortuitous finding of ship's negligence has provided the concurrently negligent stevedore with a $1,000 lien recoupment. Obviously, the vessel, which was sixty percent at fault,

cannot complain about liability for sixty percent of the loss.

When the damages attributable to the fault of the stevedore exceed its compensation lien, a more difficult situation arises. Assume the following findings:

Vessel's fault	40%
Stevedore's fault	50%
Longshoreman's fault	10%
Damages	$10,000
Compensation lien	$4,000

The longshoreman recovers a judgment of $4,000 against the shipowner (forty percent of $10,000). Because the fault of the stevedore reduced the plaintiff's recovery $5,000 (fifty percent of $10,000), an amount in excess of the stevedore's compensation lien, no repayment of the lien is required. As above, the vessel cannot complain, for its liability is in proportion to its fault. The stevedore's liability is limited to $4,000, the amount of payments made by it pursuant to the compensation act. Whenever damages attributable to the stevedore's fault exceed the amount of its lien, the compensation act, as applied under the Equitable Credit, would actually reduce the stevedore's potential liability to a level beneath what it would have been were the stevedore a joint tortfeasor not protected by the Longshoremen's Act.[1] The injured longshoreman, however, now recovers only $8,000-$4,000 each from the shipowner and stevedore. At first blush, it appears that injustice has been done, for the longshoreman's recovery is now $1,000 less than it would have been in the absence of a compensation statute.[2] Upon reflection, though, this result is neither strange nor unfair.

[1] Admiralty now allows contribution from joint tortfeasors not statutorily immune in non-collision cases, with such contribution based upon comparative fault. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

[2] If no statute applied, the $9,000 recovery would be calculated in the normal manner. The longshoreman would receive full damages, but reduced by $1,000 because of his own 10% contributory fault.

Whenever a longshoreman is injured by the negligence of his employer and compensation payments to him fall short of what could have been recovered in action at law, the same result will follow. While the result might appear unjust in a given case, it spotlights the tradeoff which is the essence of the workmen's compensation scheme.[3]

In applying an Equitable Credit in this case, the following facts are relevant:

Total damages	$100,000
Edmonds' fault	10%
Stevedore fault	70%
Shipowner fault	20%
Compensation lien	$49,152.23

The lien consists of all payments made to or on behalf of Edmonds by Liberty Mutual through December 18, 1978.

Application of an equitable credit will result in Edmonds' receiving $20,000 from the vessel which he would keep. He will also keep all of the benefits paid by Liberty Mutual because the 70% fault of the employer deprived Edmonds of damages amounting to $70,000 (70% of $100,000). Inasmuch as the deprivation caused by employer negligence exceeded the lien, there would be no lien repayment so that Edmonds would initially realize $69,152.23, approximately $21,000.00 less than the verdict of $90,000. Edmonds, however, is continuing to receive benefits for temporary total disability at the

[3] The *en banc* opinion of the Fourth Circuit below amply demonstrated its understanding of this tradeoff.

> From the longshoreman's point of view, this is not a harsh result. He is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury.

577 F.2d at 1156, App. pp. A58-59. *See also Griffith v. Wheeling-Pittsburgh Steel Corp.*, 452 F. Supp. 841, 847 (W.D. Pa. 1978). For a discussion of the tradeoff and of other examples, see Coleman & Daly, *supra*, note 23, at 377-81.

rate of $184.07 per week. While *amici curiae* herein have no further information concerning the present status of the lien, the availability of future benefits will affect the ultimate application of any credit. This Court need not concern itself, however, with that issue. If the opinion of the Fourth Circuit below is affirmed, the district court will be ideally situated to consider in full the implications of future compensation benefits during the pendency of the interpleader action suggested by Judge Haynsworth, 577 F.2d at 1156, Petitioner's Appendix at A61.

ANALYSIS OF *SHELLMAN V. UNITED STATES LINES*, 1975 A.M.C. 362 (C.D. CALIF. 1974), *REV'D*, 528 F.2d 675 (9th CIR. 1975), UNDER THE EQUITABLE CREDIT

In *Shellman*, the jury found the following:

Total damages	$15,485.00
Shellman's fault	0%
Stevedore fault	70%
Vessel fault	30%

The compensation lien in *Shellman* was $9,977.41 (letter to counsel for *amici curiae* from defense counsel in *Shellman* dated March 30, 1976).

Application of the Equitable Credit would have resulted in the entry of judgment against the vessel owner in the sum of $4,645.50 (30% of $15,485.00). The negligence of the stevedore deprived Shellman of the balance of his damages, $10,839.50 (70% of $15,485.00). Since that sum exceeded the amount of the lien, however, Shellman would have been permitted to keep his compensation benefits of $9,977.41 and the stevedore, statutorily protected from any liability in excess of compensation, would not have been required to pay the difference. The end result for Shellman, however, would have been recovery of the sum of $14,622.91. While such a recovery is $862.09 less than the award he received as a result of the Ninth Circuit's decision, it would not necessarily be his total recovery under the Equitable

Credit. The compensation lien at the time of trial did not include an award for permanent disability (although a small advance for permanent disability had been voluntarily paid by the stevedore's compensation carrier). Moreover, there was evidence presented in the trial court that Shellman could never work again as a longshoreman. Assuming that, in the absence of any third-party liability, Shellman would have been entitled to some further compensation for his permanent disability, it follows that Shellman would similarly have been entitled to further compensation for his permanent disability under the Equitable Credit. This is because Shellman's employer, through the payment of compensation benefits, neither shouldered its proportionate share of his third-party recovery nor paid benefits up to the full limit of its statutory exposure.

If the benefits for permanent disability proved to be in excess of $862.09, Shellman would have been made completely whole. The application of the Equitable Credit would not have resulted in any diminution of his total recovery from all sources. If less than $862.09 was owed under the LHWCA for permanent disability, the shortage would simply result from the trade-off for guaranteed compensation on an adjusted and realistic scale irrespective of fault for the accident which produced his injury.

The actual *Shellman* result, however, can hardly be considered a just one. The principal beneficiary was the 70% wrongdoing stevedore. Although Shellman's ultimate recovery might have been as much as $862.09 less than the Court awarded him, it would have exceeded compensation benefits by $4,645.50; and the end result required the vessel owner to pay $10,839.50 (representing the stevedore's 70% portion of the $15,485.00 award) for someone else's wrongdoing. The primary wrongdoer went scot free.

A PROPOSAL FOR DETERMINING THE ULTIMATE COMPENSATION LIABILITY OF NEGLIGENT STEVEDORES UNDER THE EQUITABLE CREDIT.

The Equitable Credit, in keeping with Congress' policy determination, limits the exposure of stevedoring employers to the payment of statutory compensation benefits. The LHWCA calls for payment of temporary total compensation benefits while the worker cannot perform his duties and is under treatment. 33 U.S.C. § 908(b)(1970). Then, once the worker has returned to his job or a determination is made that he will never be able to return, either permanent partial disability, 33 U.S.C. § 908(c)(1970), or permanent total disability, 33 U.S.C. § 908(a)(1970), becomes payable, depending on the case. Frequently, only temporary benefits are paid prior to resolution of the worker's third-party action against a shipowner. Such was the case in *Frasca* where a permanent award of $9,571.02 was made *after* the third-party action, increasing compensation ultimately due to $15,009.32. Thus, while it is true that the compensation lien was only $5,438.30 at the time of trial, that figure did not represent the stevedore's full potential compensation liability under the LHWCA.

Mechanically allowing a negligent stevedore to limit its compensation payments under the Equitable Credit to those paid previous to resolution of the third-party action, without reference to the nature of those payments, would cause incongruous results from one case to another. Obviously, the amount of Frasca's total recovery should not depend upon the order in which the proceedings occur. There is no doubt that if Frasca had obtained his award for permanent disability *before* the trial of his third-party action, the entire $15,009.32 lien would have been considered as if it had all been paid, although in practice the compensation benefits for permanent disability would be paid by the stevedore's compensation carrier on a weekly basis over a period of

months. Since the compensation ultimately due, $15,009.32, exceeded the amount by which his employer's negligence reduced his recovery ($10,500.00), Frasca would be required by the Equitable Credit to repay the final $4,509.32 ($15,009.32-$10,500.00). Since that money had not yet been paid, however, the practical result would simply be to allow the stevedore's compensation carrier to stop compensation payments once the benefits paid equaled $10,500.00, since beyond that amount Frasca would be required to reimburse the carrier from his third-party recovery.

The rule that flows from this analysis, although appearing complicated, is actually very simple. A stevedore (or its compensation carrier) must pay compensation benefits equal to its full statutory liability, or to its proportionate share of the injured employee's third-party recovery, whichever is lesser. This rule simply reflects the fact that, once a stevedore has advanced compensation equal to its proportionate fault, it is entitled to a credit for the full amount of damages paid by the third-party shipowner before any further compensation is due. Then, if further compensation is due beyond the amount of the third-party judgment, the stevedore will be liable for a deficiency as before.

Thus, in *Frasca,* had the Equitable Credit not been rendered moot, the rule would have been applied as follows: The shipowner would have been required to pay its proportionate damages of $8,400.00. The stevedore would be required to pay compensation until a total of $10,500.00 (based on its proportionate fault) was advanced, since that amount was less than its full statutory exposure of $15,009.32. Since the $10,500.00 in compensation, when added to the third-party recovery of $8,400.00, exceeded that total compensation exposure, there would have been no deficiency and hence no further compensation paid beyond $10,500.00.

Law Offices

VANDEVENTER, BLACK, MEREDITH & MARTIN

August 14, 1974

Liberty Mutual Insurance Company
P. O. Box 12029
Suite 211, Koger Executive Center
Norfolk, Virginia 23502

Re: Stanley Edmonds v. Nacirema Operating Co., Inc. — D/A: March 3, 1974

Gentlemen:

A suit has been commenced in the United States District Court for the Eastern District of Virginia by Stanley Edmonds against the owners of the M/V ATLANTIC COGNAC for injuries allegedly sustained by Edmonds on March 3, 1974, by working as a longshoreman on the ATLANTIC COGNAC and while employed by Nacirema Operating Co., Inc.

We would very much appreciate your sending us copies of all medical reports pertaining to this longshoreman. We would also like to be advised of the amount of compensation and medical benefits paid to this longshoreman, the time lost from work as a result of this injury, his average weekly wage, and any information which you may have as to the facts and circumstances surrounding this accident.

We would very much appreciate your cooperation in connection with this matter.

Very truly yours,

VANDEVENTER, BLACK, MEREDITH & MARTIN,
CHARLES F. TUCKER

CFT/led

Law Offices

VANDEVENTER, BLACK, MEREDITH & MARTIN

Mr. Glen O. Ulrici March 4, 1975
Liberty Mutual Insurance Co.
P. O. Box 12029
Suite 211
Koger Executive Center
Norfolk, Virginia 23502

Re: Stanley Edmonds — Nacirema Operating Co. — See: 535-73209 Reg. Date of Accident — March 3, 1974

Dear Mr. Ulrici:

As you know from our letter of August 14, 1974, and our telephone conversations the most recent of which was on February 4, 1975, we are representing Compagnie Generale Transatlantique, the owner of the M/V ATLANTIC COGNAC in defense of an action for damages brought by Stanley Edmonds as a result of injuries sustained on March 3, 1974, while employed by Nacirema Operating Co., Inc. and working on board the M/V ATLANTIC COGNAC. Enclosed herewith is a copy of the Complaint and the Answer filed thereto.

This case is presently set for trial on March 6, 1975. You are invited to take notice that the defendant expects to offer proof at trial that the negligence of Nacirema Operating Co., Inc. and/or its employees, including the plaintiff, was either the sole or a substantial concurring cause of the plaintiff's injuries, and that because of such negligence, there may be a reduction of the plaintiff's judgment, if any, by an appropriate percentage or amount, and that neither Nacirema Operating Co., Inc. nor Liberty Mutual Insurance Company as its insurer will be entitled to recovery of any lien for compensation or medical benefit.

You are invited to assume the defense of this litigation at this time for your account and pay any and all amounts that may become payable to the plaintiff or to participate in the defense of this litigation in any way that you see fit.

Should you need any further information with regard to this matter, we will be happy to supply the same.

Very truly yours,

VANDEVENTER, BLACK, MEREDITH & MARTIN,
CHARLES F. TUCKER

CFT/bws
Encls.

LIBERTY MUTUAL

March 7, 1975

Charles F. Tucker, Atty.
One Commercial Place
Norfolk, Virginia 23510

RE: STANLEY EDMONDS — NACIREMA OPERATING CO. — C535-73209 REG D/A 3/3/74

Dear Mr. Tucker:

In reference to your letter of March 4, 1975 concerning the above captioned and the trial scheduled for March 6, 1975. We respectfully deny your invitation to take over the defense in this action and will not be represented at the trial.

Our lien should be on record with all parties.

Very truly yours,

GLEN O. ULRICI
Claims Supervisor

GU:NC

Law Offices
VANDEVENTER, BLACK, MEREDITH & MARTIN

July 28, 1977

Liberty Mutual Insurance Co.
P. O. Box 12029
Suite 200
11 Koger Executive Center
Norfolk, Virginia 23502

ATTENTION: Mr. Glen O. Ulrici

Re: Stanley Edmonds — Nacirema Operating Co.
C535-73209 REG

Gentlemen:

As you undoubtedly are aware, the above longshoreman, Stanley Edmonds, some time ago filed a third party claim against Compagnie Generale Transatlantique, the owners of the SS ATLANTIC COGNAC for damages allegedly resulting from an injury sustained by him on March 3, 1974 while employed by Nacirema Operating Co. and working on board the ATLANTIC COGNAC.

This case was first tried in the United States District Court for the Eastern District of Virginia in March of 1975 and a jury verdict at that time was later set aside by the judge. The case was again tried in December, 1975 and a judgment was granted in favor of the longshoreman. Upon appeal, however, to the United States Court of Appeals for the Fourth Circuit, the decision was remanded to the District Court with directions that the Court reduce the judgment by the proportionate fault attributable to the stevedoring company, Nacirema Operating Company. The Court of Appeals in effect, found that the defendant shipowner was only responsible for that portion of the damages caused by its own negligence and in addition was required to repay to the compensation carrier for the stevedoring company its lien.

A petition for rehearing was filed as a result of the decision of the Court of Appeals and this petition has been granted. It now appears that the case will be reheard before the Court of Appeals in October. In view of the fact that Liberty Mutual Insurance Company as compensation carrier for Nacirema Operating Company has an obvious interest in the outcome of this litigation, the purpose of this letter is to invite you to file an amicus brief with the Court on behalf of Liberty Mutual Insurance Company in order that all interested parties may be before the Court at the time of the rehearing.

I will be glad to furnish you with further information with regard to the rehearing should the same be required.

Very truly yours,

CHARLES F. TUCKER
Of Counsel for Compagnie
Generale Transatlantique

CFT/kb

Law Offices
VANDEVENTER, BLACK, MEREDITH & MARTIN
September 22, 1975

Mr. Glen O. Ulrici
Claims Supervisor
Liberty Mutual Insurance Company
P. O. Box 12029
Suite 200 11 Koger Executive Center
Norfolk, Virginia 23502

Re: Stanley Edmonds — Nacirema Operating Co.
C535-73209 — D/A 3-3-74

Dear Glen:

In accordance with our telephone conversation of this morning, I am enclosing herewith a copy of the decision rendered by Judge Kellam in this case setting aside the jury verdict and ordering a new trial. The new trial is scheduled for December 16, 1975.

Also in accordance with our telephone conversation, I would appreciate your sending me the latest medical reports which you have concerning this man and also advising me of the amount of the compensation lien to date.

Thank you very much for your cooperation.

Very truly yours,

VANDEVENTER, BLACK, MEREDITH & MARTIN

CHARLES F. TUCKER

CFT/kb
Enc.